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Sanskrit Academy Granthamālā - 135

Jurisprudence in Ancient Bharath

Author

Dr. A. Anantha Krishna Rao

M.A. (Litt.) LL.B, CAIIB; M.A, M.Phil, Ph.D (Sanskrit)

General Editor

Prof. K. Neelakantham

Director

Sanskrit Academy

Adarsha Shodha Sanstha

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Osmania University, Hyderabad – 500 007

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Phone:
8331021001

Email:
sanskritacademyhyd@gmail.com

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आमुखम्

ओम् श्री गुरुभ्यो नमः
॥ओम् श्री शङ्करभगवत्पादा विजयन्ते ॥

॥ओम् नमः भगवते वेदपुरुषाय,
नमः पराशर-व्यास-वाल्मीकि-मनु-वाचस्पति-शुक्र-नारदादिभ्यः
धर्मशास्त्रसम्प्रदायप्रवर्तकेभ्यो मुनिभ्यो महद्भ्यो गुरुभ्यः ॥

We feel and privileged to have published three books on Ancient Indian Judiciary System ***Vyavahāracintāmaṇi*** of Vachaspati Misra, ***Kātyāyanasmṛtisāroddhāra*** edited by Bharatartna P. V. Kane and ***Daṇḍaviveka*** of Vardhamana from Sanskrit Academy and bringing now, one more book **Jurisprudence in Ancient Bharat** authored by Dr A. Anathakrishna Rao. This is indeed an authentic research work on ancient judicial systems.

Legal system - Prācīnabhāratīyavāṅmayam:

When people discuss about the knowledge systems of ancient Bharat, they talk about civilization, culture, tradition, religion, medical Science, literature etc. but not about the hoary legal system. In fact, what is most essential for each and every individual and for the society to survive is its **legal system** or **jurisprudence.** We have one of the most advanced laws which were written by great sages since ancient times. These ancient and sacred laws have some advancement than what we see even in the laws of the 21st century. The genesis of Dharma is not from a particular book or by a single person; but is a collection of many books and commentaries, and its root came

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from Rig Veda[1], and believed that it is divine law, it was God who revealed this entire knowledge to the sage's when they are in the deep contemplation, and they later refined the conceptual ideas of life mentioned and explained in Vedas (Shruthi's).

So, this Dharma which is also known as Hindu law today, which means righteousness, duty, and law, which applies to everyone, and it consists of truthfulness, non-injury, and generosity, and many moral virtues. We know that there are three sources of Dharma, *the first one is Vedas, the second one is Smritis and the third one is Achara*. Smritis means remembrance of a tradition, which is preserved by the authors in the written form. The famous Smritis which most of us know are ManuSmriti, YajnavalkayaSmriti, which are still relevant in the 21st century. The third source is Achara's which means the customary law, which is followed by a particular group or community. We follow Achara on the issue where the Vedas & Smritis are silent[2]. These three things combinedly made ancient Hindu law as a holy trinity. The Dharma follows the law of natural justice, these laws are divine and cover all the facets of society whether its political, social, religious, or spiritual duty of a person, dharma makes the life of an individual complete and makes a person civilised. Dharma also refers to the structure of

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[1] अग्निर्हि देवाँ अमृतो दुवस्य त्यथा धर्माणि सदती दूदुषत् ॥ RigVeda 3-3-1 {Immortal Agni indeed serves the divinities and therefore never breaks their everlasting laws."}
त्रीणि पदा विचक्रमे विष्णुर्गोपा अदाभ्यः। अतो धर्माणि धारयन्। RigVeda 1-22-18 {Viṣṇu, the protector whom none deceives, took three steps: hence he established the dharmas (the laws}
धर्मणा वरुणा विपश्चिता व्रता रक्षेथे असुरस्य मायया ॥ RigVeda 5-63-7 {By Dharma the wise Mitravaruna protect the vratas i.e Laws of the magic of the divinity}

[2] शास्त्राभावे शिष्टाचारोऽनुसर्तव्यः ॥

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reality. It is cosmic law. It is the law of life and development. It is Sanatana i.e. eternal; it is the support of whole universe. Dharma signifies universal principles for regulating. The purpose of Dharma is the stability of society, the maintenance of social order, and the general welfare of the mankind. And whatever conduces to the fulfilment of this purpose is called Dharma[3]. For the purpose of regulating conduct among the humans many injunctions and prohibitions were codified in the Dharmashastras. They are the records of legal knowledge and insights. The purpose of dharma is to maintain and conserve established social order as well as the general welfare of humankind. The violation of laws is destructive in social life, hence there is a need to maintain law and order. The rules have to restrain the people who do not restrain themselves. स नैव व्यभवत् तच्छ्रेयोरूपमत्यसृजत धर्मम्। तदेतत् क्षत्रस्य धर्मं यध्दर्मः ।तस्मात् धर्मात् परं नास्ति। अथो बलीयान् बलीयांसं आशंसते धर्मेण यथा राज्ञा एवं यो वै स धर्मः। सत्यं वै तत् ।तस्मात् सत्यं वदन्तमाहुः धर्मं वदन्तीति, धर्मं वा वदन्तं सत्यं वदन्तीति। एतध्द्वैवेतत् उभयं भवति। (बृहदारण्यकोपनिषत्) । Here, in his commentary on this text Acharya Shankara explains: Satya and Dharma thus- सत्यं यथाशास्त्रार्थता स एवानुष्ठीयमानः धर्मनामा भवति। Satya is the speaking of the truth while Dharma is the observance in action of truth. An analysis of the significance of these three words brings out clearly to us the fundamental basis of dharma as the ideal for

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[3] धारणात् धर्म इत्याहुः धर्मो धारयते प्रजाः।
यो वै धारणसंयुक्तः स धर्म इति निश्चयः।। (महाभारते, कर्णपर्वणि 69 अध्याये 59 श्लोकः)
प्रभावार्थाय भूतानां धर्मप्रवचनं कृतम्।
यः स्यात् प्रभवसंयुक्तः स धर्म इति निश्चयः।। (महाभारते, शान्तिपर्वणि 104 अध्याये 10 श्लोकः)

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the individual. While Rita denotes the mental perception and realization of truth and Satya denotes the exact true expression in words of the truth as perceived in the mind, Dharma is the observance in the conduct of life, of truth.

Dharmashastras have prescribed punishments for violation of dharma in the society. They also have laid down laws to resolve the conflicts between the individuals and society. A system of law is essential to maintain social harmony.

Despite the other schools of Jurisprudence, the Hindu Jurisprudence takes more care over the duties more than the rights. The nature of these Dharma changes from person to person. There are many duties of many people in this world like earlier, the king's duty was to uphold the religious law and the other hand a farmer's duty is to produce food, the doctor has to cure the people, the lawyers have to fight for justice. Being a highly religious concept in nature, Dharma is multi-faceted. It contains many laws and customs in a large range of subjects which is essential and needed to be followed by each and every person. For example, *Manusmriti* deals with religion, administration, economics, civil and criminal law, marriage, succession, etc. These we study mainly in our law books.

Dharma and Jurisprudence:

The notion of *dharma* as duty or propriety is found in India's ancient legal and religious texts. Common examples of such use are पितृधर्म, पुत्रधर्म, राजधर्म and many others. In the प्राचीन भारतीयेतिहास, justice, social harmony, and happiness requires that people live per *dharma*. The Dharmashastra of ancient Bharata is a record of these guidelines and rules. The available evidence

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suggest that Bharatadesha once had a large collection of *dharma* related literature (sutras, shastras); four of the sutras survive and these are now referred to as Dharmasutras. Along with laws of Manu in Dharmasutras, exist parallel and different compendium of laws, such as the laws of Narada and other ancient scholars. These different and conflicting law books are neither exclusive, nor do they supersede other sources of *dharma* in Hinduism. These Dharmasutras include instructions on education of the young, their rites of passage, customs, religious rites and rituals, marital rights and obligations, death and ancestral rites, laws and administration of justice, crimes, punishments, rules and types of evidence, duties of a king, as well as morality.

Jurisprudence in Ancient Bharat:

The present book on **Jurisprudence in Ancient Bharat** by Dr A. Anantha Krishna Rao, is a very exhaustive and analytical work on the legislation and execution of Law and governance in ancient times of India. The author has scrupulously explained the subtle aspects of legal system expounded in the ancient times, beginning with the sages of Rg Veda, till today's famous judges. The book is divided into eight chapters and the headings of these chapters speak about the comprehensive approach of the author to this sublime subject. Both the introduction and conclusion are very informative and exhaustive in explaining the subject matter of law and the need of its enforcement. The concept of Evolution of Law, legal prescriptions, judicial system in various Dharma shastras and many more wonderful features of our ancient law and global application of these important aspects of the legal system of olden times, which was based on

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Dharma, are explained in depth in this book. A whole chapter is devoted to explain about the Human Rights in Ancient Bharat. And this itself is enough to convey what a global perspective our ancient people had.

The author ' s effort and endeavour are highly praiseworthy. He has quoted profusely from so many books and made his work very authoritative and authentic. The author throws equal light on the present legal system. In many occasions, the rules and articles of India penal code, in present legal system are explained. In fact, such a great observation so closely on this deep subject is possible for a person who is in the profession of advocacy. The author is to be appreciated and congratulated for he quoted and substantiated exhaustively from the original texts of Sanskrit literature. It is amazing to know that the list of books he referred are from ancient sages to today's human activists like Menaka Gandhi. The bibliography of more than 100 books, from Rg Veda to Ram Jos, talks about the importance he gave to bring out this weighty subject in a very interesting and convincing manner.

The glossary and index given by the author, are the two additional important elements of the book.

This valuable hand book on judicial system in the past and present India, it is hoped, will be of great help to the future research work, and of great use to the students pursuing for law. And it is a source of great inspiration to focus on the truth that the legal system expounded in ancient times is based on Dharma- the divine law, is not a forcible imposition of rules but on the need of individual discipline, and aims not on individual priorities but on the welfare of the society. The book is a proud

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declaration that our ancient people expounded a judicial system of global application of values and of global vision.

Dr A Anantha Krishna Rao did a thorough research on it for obtaining Doctoral Degree in Sanskrit from Osmania University. After retiring from State Bank of Hyderabad in which he has worked for several years in various capacities, he devoted completely for learning Sanskrit and Shastras. He is well versed in science of legal studies and management. Being a Swayam Sevak he has good knowledge of Bharatiya samskriti and sampradaya. All these helped him to pursue research in judicial system of Bharatadesha. He has approached stalwarts like Padmasri Awardee Mahamahopadhyaya Pullela Sri Ramachandrudu and many others in Sanskrit for his research and had a deep study. I thank him sincerely for allowing us to publish the second edition of this wonderful book from Sanskrit Academy.

I always think amicably the support and sincere help of my two deputy directors Dr. V. Subrahmanyam and Dr. K. Varalakshmi, the two research assistants Dr K. V. Suryaprakash and Dr. Joshi Santoshkumar and I bless young researcher Mr. Joshi Bharadwaj and other staff members of our academy.

I must record my sincere thanks to Prof. Srinivas Varkhedi, honorable Vice Chancellor and Prof. Gayatri Muralikrishna Registrar, Prof Madhukeshwar Bhat Director, Adarsh institutes in Central Sanskrit University, New Delhi who motivate us in the field of research and propagation of Sanskrit. And I am grateful to Prof. D. Ravinder, honorable Vice Chancellor and Chairman Management committee of Academy

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and Prof. Lakshminarayana Registrar of Osmania University for their continuous support and encouragement.

I thank Karshak Art Printers Vidyanagar, Hyderabad for printing this book on time.

सुधीजनविधेयः

आचार्यो के नीलकण्ठः

निदेशकः, संस्कृत अकाडमी

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Foreword

A study of judicial system in ancient India is not an academic curiosity but a serious re-discovery of our heritage. Sadly, most educated persons including those from legal profession, take it for granted that our laws are totally the gift of the British. As a police officer myself, I had no chance of knowing the Indian jurisprudence till, by chance, my Sanskrit teacher Sri Pullela Sriramachandrudu presented a copy of his Telugu commentary on Kautilya's ***Arthashastra.*** It was a revelation to find that some of the concepts of law as we see now are mere modifications of the ideas from the earlier texts. Further perusal of books like ***Manusmriti*** confirmed my view that most of the concepts are but reproductions.

The present book ***"Judicial System in Ancient India"*** is a comprehensive introduction to the civil and criminal law in ancient India. It traces the origins of law from the Vedic times, analyzes the sūtra literature and the smṛti literature. There are eighteen main texts of smṛti literature such as the ***Manusmriti, yājñavalkyasmṛti, parāśarasmṛti, nāradasmṛti.*** These texts usually are in three sections – the first section known as ***ācārakāṇḍa,*** dealing with ethical conduct, the second section known as ***vyavahāra kāṇḍa,*** dealing with jurisprudence and the third section known as ***prāyaścittta kāṇḍa,*** dealing with the penances for unethical or sinful conduct. This means that the texts on Dharmaśāstrās deal with actions which come under the purview of law that can be enforced by courts and actions (ethical and unethical conduct) which do not come under the fold of enforceable law. The section called ***vyavahāra kāṇḍa*** is the enforceable law. The topics of dispute (***vyavahāra sthānāni***) identified in this section cover almost all the topics which we see in our law texts today. It may be interesting to note that all shades of crookedness of modern times were also present in those 'good old' days and that they were well handled by the law makers. The present writer has covered all these topics.

The ancient law texts have meticulously defined the eligibility and qualities needed for the judge, the jury and the witnesses. Subtle

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issues like the admissibility of witnesses and the admissibility of evidence have also been discussed. The commentary ***Mitākṣarā*** on the ***yājñavalkyasmṛti*** is like the fountain source for most legal concepts.

Unlike several modern writers, the present author is a scholar in Sanskrit and he has studied the texts in original. Hence his authority on the text is unquestionable. He has touched upon the sources of legal texts and has also given the chronology of the texts. This gives a comprehensive picture of the growth of legal tradition in our country. The basic principles of jurisprudence have also been touched upon. Our tradition has been a combination of the adversarial system and the inquisitorial system. This has been well explained by the author in chapter eight. It is an important corner stone of Indian law. "Let hundred criminals escape but let not one innocent suffer" – says the present criminal law. Our motto was – "let not one criminal escape and let not one innocent suffer". The ruler would accrue sin if he were to let one criminal escape or punish one innocent person.

The author has referred to the contemporary concepts such as human rights and the rule of law and has ably established as to how these concepts are very much the core doctrine in Indian texts. The concept of human rights is a principle emanating from the ***Upaniṣadic*** concept of ***samadarsana.*** The author has provided adequate examples to substantiate this.

The concluding portions of the book give some useful suggestions for the present law makers. A glossary of the ancient legal terms and present equivalents is of great interest to the modern reader. This work should inspire students and scholars to delve further into our texts and bring them close to the present day readers.

Aravinda Rao.K
Retired DGP,
Hyderabad

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Fore word

Ancient Indian legal system is one of the most ancient systems of law in the planet earth. Mayne in his treatise on Hindu law and Usage observes that Hindu Law has the oldest pedigree of any known system of jurisprudence and even now it shows no signs of decrepitude. Though it was mixed up with the moral and legal it always kept pace with the social changes in that remote past and established its nature as dynamic and never static whatever may be the social upheavals. The Indian Saints, who were responsible for the scriptural literature, were outstanding and extraordinarily capable persons and they were rightly regarded as great jurists. In India the Law developed independently to meet the needs of contemporary society.

India's greatness lies in its cultural heritage. In ancient Bhārat there existed a high level of civilization when there was no civilization in other parts of the world. It is desirable to bring out the achievements of Ancient Bhārat which would make the present generation feel proud and strengthen the national spirit among them. Judicial System and its operating mechanism is one such area where contributions from ancient India are laudable. On account of thousands of years of alien rule the earlier glory of ancient Bharat could not be seen in its proper perspective.

Dr. Ayyadevara Ananthakrishna Rao, a senior executive of State Bank of Hyderabad after his retirement took to Sanskrit study and obtained doctorate from Osmania University. He made an exploratory search into the treasure house of ancient India and brought to light the precious gems in the form of legal concepts and jurisprudential theories. He has traced from the Vedic period the origin of law, the concept of dharma, the institution of Kingship and how the Sabhā and Samiti could provide democratic checks over the King. From the social context obtaining at that time he

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could trace the village level courts and the King's authority in administration of Justice.

Thousands of years must have lapsed from the Vedic Period to reach Sutra period viz., (600 BC) where the Dharmasūtrās of Gautama show a detailed code of legal system. The Dharmasūtrās, the ***Arthaśāśtra*** of Kautilya (400 BC), the Smṛti literature along with the Nibandhās and the Commentaries reveal a state of the society in which the Indian Law highly developed both in its civil and criminal sides including their substantive as well as procedural aspects. But the ancient Indian Law was neglected during alien rule.

Dr. Rao has dealt with the whole gamut of the judicial system of Ancient India and brought out its contemporary relevance as most of the precepts have been incorporated in the modern statutes. Sanskrit manuscripts relating to various subjects including Judicial system of Ancient Bhārat found their way into many countries long back and that appears to be the possibility for the contemporary relevance in many of the Judicial Systems including the present system said to be formulated by the British regime. To establish that the ancient Indian Judicial system is the fountain head for the modern system the author has brought out many comparisons and some of them are as under:

Diplomatic immunities and the proportionality of punishment followed in the ancient system are also now implemented as modern doctrines.

Doctrine of separation of powers was already in vogue as King not to construct law. Executive powers and judicial powers were separate and the Pariṣad was to formulate the law.

Mobile and special Courts for army and for special tribes were of the same nature as those different types of tribunals in the present day setup.

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In the case of civil wrong the aggrieved party had to lodge a complaint whereas in the case of crime it was the duty of the state to initiate action on its own or on receiving information from anywhere including the aggrieved. Same procedure is followed in the present system also.

He who instigates, he who assists and he who commits a crime are punishable as per Apastamba sutras. IPC sec. 107 also says the same.

In the case of immovable property and boundary disputes documents are the primary mode of proof. (*Vāśiṣṭa Dharmasūtrās.)*

Same case was not allowed to be filed against a defendant twice. (Kautilya *Arthaśāśtra.*) Secton11 CPC also takes the same view by Res Judicata. Appointment and the responsibility of Niyogi to represent the parties to a case are similar to that of the present day lawyers. (Kautilya *Arthaśāśtra*)

An offence committed in self defence was not treated as criminal act. This compares well with the provisions of self defence in IPC.

Vākpāruṣyam (defamation), Daṇḍapāruṣyam (Assault), Theft (Steyam), Sāhasa (offence by violence), Strīpuṃdharma (Duties of Husband and wife) are of the same in nature as to the contents detailed in IPC.

Arthaśāśtra of Kautilya gives the details with regard to the institution of trial and its procedure almost conforming to the procedures obtaining in the present system.

There is a striking similarity between order XIV rule 1(5) of the code of civil procedure and the rule prescribed in the smrities on the question of framing issues and fixing burden of proof.

A person who resorts to a totally different plea than the one pleaded as earlier called anyavadi and not allowed. This is similar to the principle of estoppels dealt under section 115 of the Indian Evidence Act.

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Hearsay evidence was no legal evidence. Exception was provided if the witness happened to be in foreign country. This corresponds to the rule of taking evidence on commission as provided for in order 26 rules 4, 4-A and 5 of the code of civil procedure.

Method of drawing presumptions under circumstantial evidence (Yukti) was same as detailed in section 114 of Indian Evidence Act. Disqualifications stipulated in sec. 118 of the Indian Evidence Act were also there in the ancient Indian Law.

Facility of paying subsistence allowance to the witnesses compares well with the CPC order XVI. R2&4.

Procedure in relation to the production of documents and list of witnesses was same as that provided in the Civil Procedure Code.

The inquisitorial system adopted in ancient Hindu Law (Kautilya ***Arthaśāśtra***) is almost similar to the procedure of the present day public interest litigation. Smṛti texts stipulated that an oath to be administered to the witness before recording his oral evidence. This requirement is also the law now in force vide sec.4 of the Indian Oaths Act.1969

With the beginning of the nineteenth century only the concept of human rights spread throughout the world particularly with the birth of the UNO. Whereas in ancient Bharat Human Rights were recognized from times immemorial. ***ṛgveda*** which is regarded as the oldest document declares that all human beings are equal and they are brothers. The ***Atharvana Veda*** declared that all human beings have equal rights over natural resources. The concept of dharma is a comprehensive term for human rights on which the whole edifice of duty based society was established.

The smṛtis naturally covered almost all the branches of law which the society then needed. Several eminent jurists wrote

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commentaries on the smṛtis during their respective times and made the smṛti laws practical, understandable and workable by codifying almost on the lines of the procedures obtaining in the modern system of judicial administration. These legal texts played a great role in developing the law and created a smooth path for application of smriti laws to the contemporary society keeping in view the changes that take place as time passed.

Classification of topics into civil and criminal and the related procedures bear many similarities to those obtaining in the present system. The system of jury, the most interesting feature of the judicial system was prevalent at that time. Qualifications and the guidelines fixed for judges conform to the present day standards. With regard to the procedure of a trial, right from the presentation of a plaint to the delivery of judgment, covering evidence, witnesses, documents/possession and oath taking was same as that of the present day system.

In ancient judicial system, throughout the legal process, sufficient care was taken at every stage right from the beginning of submission of plaint to the delivery of judgment to avoid delays. Adjournments were restricted to the barest minimum. Truthfulness of deposition was ensured by allowing only those as witnesses who bear good conduct. The system was not allowed to become a victim of technicalities. Provision for punishment was there against false witnesses and also against improper behavior of judges.

It is noteworthy that the maxim "Rule of law" was strictly followed in the ancient judicial system of India. The rule of law is a legal maxim which provides that no person is above the law, that no one can be punished except for breach of the law and no one can be convicted except in the manner set forth by the law itself. It shows how meticulous the ancient legal system functioned strictly in accordance with the principles of natural justice.

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I am extremely happy to state that the endeavour of Dr.Ananthakrishna Rao will be a signal contribution for tracing the evolution of law from the Vedic era, particularly, from the time of ***ṛgveda*** the oldest treatise in the world. I am confident that this book would be helpful to the readers in appreciating and understanding the great contributions of our ancestors in the field of jurisprudential concepts and legal procedures at the earliest point of time known to human society.

Y.Bhaskar Rao
(Justice Dr. Y.Bhaskar Rao)
(Former Chief Justice of High Court of Karnataka)
(Former member of National Human Rights Commission.)

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PREFACE

It is surprising to note that even among learned there is a view that the ancient Indians had no exposure to sound judicial and administrative systems and the present institutions of law and administration of justice have been created by Britishers who ruled our country for more than a century. Further, about the antiquity of judicial system in the world only Rome and China are talked of but not India. But the fact remains that the Indian Judicial system is most antiquarian of all such systems in the world and it is a treasure house containing precious gems in the form of legal concepts and jurisprudential theories providing a primary source for the current judicial systems throughout the world.

In ancient India, there existed a high level of civilization and culture when there was no such development of civilization, anywhere in the world. It is necessary to bring out the great achievements of ancient India in various segments of society which would make citizens feel proud and strengthen the national spirit among them. Judicial system and its operating mechanism is one such area where contributions from ancient India are laudable.

The pattern of ancient judicial systems has contemporary relevance as most of the precepts have been incorporated in modern statutes. Further many of the extant procedures being followed in various institutions of law and administration of justice have their source in the similar institutions of ancient India. It can safely be said that proper judicial system and procedures were existing in ancient India and they became the primary source for the modern system.

Hindu judicial system with its combined approach of moral, religion and law is so ancient that it might have been a source not only for the so called English law but also for many aspects

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of civilization in many countries. Since the Sanskrit language (manuscripts) spread long back the intellectual wealth and Indian culture (bhāratīyasaṃskṛtiḥ) throughout the world and earned the status of world teacher (jagadguruḥ) to Bhārat, and that may be the reason for so much contemporary relevance being found in the present judicial system claimed to be introduced by Britishers.

The concept of dharma is understood as basis of law. It is said that the dharma was the sovereign over the sovereign and the King was under its command. The Dharmasutras (600 B.C.---300 B.C.) assume great importance on account of framing a detailed legal procedure for the first time to enable the King to administer justice systematically. They constitute the foundation of Hindu legal system.

Satyam vada dharmam chara is the basic concept propounded in vedās which is the foundation for any system of jurisprudence anywhere in the world. Vedās occupy an important and elevated position and are taken as basic standard in establishing whether a particular issue is in conformity with the rule of law or not.

It was for the pariṣad, an assembly of learned persons, to formulate laws. King's executive powers were entirely different and not concerned with the judicial concepts prescribed in smṛtis. Thus the sanctity of the doctrine of separation of powers was implemented to avoid the administrative interference in judicial matters.

There were peoples' courts. These institutions of private arbitration appear to be quite close to the modern pañcāyats. They believed in the principle of self-government and decentralization of authority right up to grass root level.

In between the Vedic period and the smṛti period the dharmasūtrās followed by Kautilya's ***Arthaśāstra*** (400 B.C) occupy

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a very important place in the history of Hindu Law. In fact the relevant parts of dharmasūtrās and Kautilya's ***Arthaśāśtra*** are the real legal literature comparable to the modern civil and criminal laws.

The Law is the King of kings, nothing is superior to law; the law aided by the power of the King enables the weak to prevail over the strong. King, as chief justice has to keep in view the opinion of judges in deciding the matters and as far as the quantum of punishment is concerned it is his prerogative to fix.

Hyderabad,
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Dr. A. Anantha Krishna Rao

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Transliteration key

The International Alphabet for Sanskrit Transliteration (IAST) has been used to denote the Sanskrit words written in Devanagari script. IAST is the most widely used key, which is also explained on the web. A brief table is given. However, it is adviced to learn the exact sounds from a teacher.

अ	a	as in *su*n	क	k	*c*ut/*k*ite	ट	ṭa	*t*ouch
आ	ā	b*a*ld	ख	kha	Boo*k*-*h*ouse, 'k' combined with aspiration 'h'	ठ	ṭha	an*th*ill
इ	i	b*i*t	ग	ga	*g*un	ड	ḍa	*D*ull
ई	ī	b*ea*t	घ	gha	Pi*g*-*h*ead, the sound 'g' in 'gun' with aspiration 'h'.	ढ	ḍha	God*h*ead, aspiration as above
उ	u	p*u*t	ङ	ṅa	Lu*ng*	ण	ṇa	*u*nder (retroflex)
ऊ	ū	t*oo*l	च	ca	*ch*unk	त	ta	Pa*th*
ऋ	ṛ	*rh*ythm	छ	cha	cat*ch*-*h*old	थ	tha	The sound 'th' in '*th*umb' combined with aspiration 'h'
ए	e	d*a*te	ज	ja	*J*ug	द	da	*Th*en
ऐ	ai	m*i*ght	झ	jha	He*dgeh*og, 'j' with aspiration	ध	dha	The sound 'th' in '*th*us' plus aspiration
ओ	o	*O*at	ञ	ña	b*un*ch	न	na	*n*umber
औ	au	*ou*t						

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प	pa	*p*ot	य	ya	*y*et	ष	ṣa	*sh*un
फ	pha	Sou*p-h*unt, aspiration as above	र	ra	*r*un	स	sa	*S*un
ब	ba	*b*ut	ल	la	*l*ove	ह	ha	*H*all
भ	bha	A*bh*or, aspiration as above	व	va	*v*oice	क्ष	kṣa, combines the 'k' in 'king' with the sound 'sh' in *Sh*aw	ri*ksh*aw
म	ma	*m*uch	श	śa	*s*at	ज्ञ	jña	

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Chapter - I
Jurisprudence in Ancient Bhārat

Judicial system in Ancient India

The singularly distinct feature of early Indian judicial system is its independent origin without any extraneous influence. It is observed, in many quarters that the extant procedures and practices being followed in the courts of law and other institutions, endowed with the magisterial powers are based on the concepts of law propounded by western thinkers. It is surprising to note that even among learned there is a view that the ancient Indians had no exposure to sound judicial and administrative systems and the present institutions of law and administration of justice have been created by Britishers who ruled our country for more than a century. Further, about the antiquity of judicial system in the world only Rome and China are talked of but not India. But the fact remains that Indian Judicial system is most antiquarian of all such systems in the world and it is a treasure house containing precious gems in the form of legal concepts and jurisprudential theories.

A ruler by name ṣerṣā implemented reforms in land survey and taxation-policy, a particular Viceroy introduced administrative reforms etc; such other observations relating to many initiatives in various segments of society have found their place in the syllabus of the students from elementary school level to university stage giving

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an impression to the young minds that everything was brought by the foreigners who invaded our country and there is nothing that we can draw upon from the treasure house of ancient India except some spiritual methods which in their opinion do not relate to the present day world.

But the fact remains that in ancient India, there existed a high level of civilization and culture when there was no such development of civilization, anywhere in the world. It is necessary to bring out the great achievements of ancient India in various segments of society which would make citizens feel proud and strengthen the national spirit among them. Judicial system and its operating mechanism is one such area where contributions from ancient India are laudable.

After securing independence of our country from foreign rule, there have been some studies by the 'Law Commissions' appointed by the Government of India. Within these six decades many changes were brought out to the present judicial system and these efforts appear to have created a view that the present system would suit the genius and culture of our country. But still a wave of dissatisfaction pervades the whole country that the law should be strengthened to meet the ever growing demands for maintaining harmony in the society.

There exist some studies on judicial system of ancient India covering many aspects but the amount of influence it exercised in providing source for the evolution of the law of civil and criminal procedure of modern system of India has not been brought to light adequately. An attempt is being made in this book with an objective to study the nature and contents of ancient Indian institutions of law and administration of justice and to trace their pattern of evolution to the present judicial system and examine the possibility of scope and extent of improvement in certain areas to the extant operating system in this regard.

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It can hypothetically be presumed that the present judicial system has evolved from the ancient system of law and justice of Bhārat, an oldest system in the world. The British who conquered the entire subcontinent had in fact relied to a great extent on the model of the ancient judicial system of Bhārat but created an impression as though there was nothing in our country to fall back upon, and the whole gamut of the system was brought by them. They claimed that they established the courts and introduced the legal system as per their English law.

The pattern of ancient judicial systems has contemporary relevance as most of the precepts have been incorporated in modern statutes. Further many of the extant procedures being followed in various institutions of law and administration of justice have their source in the similar institutions of ancient India. It can safely be said that proper judicial system and procedures were existing in ancient India and they became the primary source for the modern system.

Hindu judicial system with its combined approach of moral, religion and law is so ancient that it might have been a source not only for the so called English law but also for many aspects of civilization in many countries as the Sanskrit language (manuscripts) spread long back the intellectual wealth and Indian culture (bhāratīyasaṃskṛtiḥ) throughout the world and earned the status of world teacher (jagadguruḥ) to Bhārat and that may be the reason for so much contemporary relevance being found in the present judicial system claimed to be introduced by Britishers.

In the light of the analytical study of ancient Sanskrit literature it is desired to examine the contributions of the ancient legal procedures to the present day judicial system. Methodology being adopted in dealing with the subject is to place reliance on the scriptural texts as sources of knowledge and by reflection on the contents relevant to the topic, inferences are to be drawn.

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In a review of the vedic literature from the standpoint of evolution of law in ancient Bhārat it is brought out that the vedās are the most ancient; particularly *ṛgveda* is the oldest treatise in the world. vedās are basic. They are taken as basic standard in establishing whether a particular issue is in conformity with the rule of law or not. Origin of King as military chief and the divinity of Kingship are traced. ṛtam is the basis of Indian thinking about law. ṛtam denotes the supreme transcendental law and maintains the cosmic order and symphony in the universe. Law is first reflected in the yājñik way of common social life. Yajña contains in itself all the main elements of a system, organization and must have been an original mode of ancient Indian life providing a direction as to how people have to conduct themselves in the society. It is a mixture of religion, legend and custom.

The concept of dharma is understood as the basis of law. It is said that the dharma was the sovereign over the sovereign and the King was under its command. It embraces every type of righteous conduct covering all aspects of life, essential for the sustenance and welfare of the individual and society. Village level administration of justice by the grāmiṇī and how the sabhā and samiti played their role in advising the King in the Vedic society is discussed.

From the mass of sūtra-literature the judicial prescriptions in the Dharmasūtrās are dealt in detail. The srauta and gṛhya sūtrās regulated religious rituals and personal code of conduct at different stages of life. Among the Dharmasūtrās those compiled by Gautama, āpastambha, Vaśiṣṭa, Baudhāyana, ḥarita and Viśnu are important and regarded as the earliest works. Customs and usages in the society were gathered and they were shaped into legal principles and embodied in the manuals as Dharmasūtrās. Thus the Dharmasūtrās assume great importance on account of framing a detailed legal procedure for the first time to enable the King to administer justice systematically. They constitute the foundation of Hindu legal system. The subjects dealt under vyavahāraḥ

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continued to grow from the time of Gautama and became an elaborate code in the *Viṣṇusmṛti* which is known as last in the sutra-literature. Though their applicability is limited to certain schools of Saṃhitās they covered comprehensively the whole system of legal procedure, ie., law courts, judges, statements of plaintiff and defendant, evidence, witnesses, burden of proof, judgment, review of judgment and punishments, etc. sūtra-literature particularly the dharma sūtrās clearly indicate that the sound procedures in the matter of administration of justice were firmly established by that time.

From the vast panorama of the smṛti literature the judicial system, the main plank of this treatise, is dealt in detail. In smṛti period the judicial procedure was further crystallized and a gradual development of 'Code of Justice' had taken place in this era.

Rājadharma ordained that the administration of justice is the personal responsibility of the King himself and thus gave prime importance to the administration of justice. The King should attentively look after law suits by freeing himself from anger and greed and conduct the court proceedings according to the dictates of Dharmasūtrās and the local customs in the company of the Chief Justice, assessors and priest. When it is impossible to act up to the precepts of sacred law, he should adopt a method based on reasoning, taking into consideration, the prevailing traditions and customs. It is stated that if the King could not examine legal procedures on account of pressure of work, he can appoint a virtuous person who conducts himself according to the sacred laws and is capable of handling legal matters. In this connection brāhmaṇa is defined as a learned person endowed with exemplified qualities without any relevance to caste system in the present day connotation. With an intention to make personal gain King or his representative should not create a case or suppress a case. He has to keep in view the opinion of judges in deciding the matters and as far as the quantum of punishment is concerned it is his prerogative. King or the judges

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appointed by him were to simply follow the provisions of sacred law. They were not given any power to formulate laws. It was for the pariṣad, an assembly of learned persons, to formulate laws. King's executive powers were entirely different and not concerned with the judicial concepts prescribed in smṛtis. Thus the sanctity of the doctrine of separation of powers was implemented to avoid the administrative interference in judicial matters. Normally, legal procedure was not allowed to be instituted between closely related people to avoid its adverse impact on the society. Rights of other judges were recognized to question the King if he deviates from the principles of sacred law.

Courts functioning at different levels are described. Pratiṣṭhitā is a court which is established at a particular village or town. Apratiṣṭitā is a mobile court, moving from place to place; mudritā is a court, appointed by the King and authorized to use the royal seal. Śaśitā is the court over which the King himself presides. In addition to these there were peoples' courts. With regard to the routine work of the courts, it is said that the following were required to carry out the proceedings properly. These are: the King, the chief judge, the jurors, smṛtīs, accountant, scribe, gold, fire, water, and bailiff. Specific time for holding the court was prescribed. kulāni, śreṇiḥ, pūga and gaṇa are the designations given to peoples' courts. Each succeeding one was superior to the preceding one. These institutions of private arbitration appear to be quite close to the modern pañcāyats. In addition to these there were special courts to deal with the disputes relating to the people who live in forests military personnel, caravans and traders. Special arrangements to deal with the disputes in respect of craftsmen such as carpenters, artisans, painters, money-lenders' guilds, dancers, sects, pāsupatās and criminal tribes were also there. They should be decided by their own conventions and usages. The kula, śreṇi and gaṇa courts could decide all disputes except those falling under the title sāhasa. Fines and corporal punishments could only be inflicted by the

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King. Though these courts were essentially non-official, they had the royal authority behind them. They believed in the principle of self-government and decentralization of authority right up to grass root level.

Duties prescribed for various court staff ie., Court clerk, Judge's clerk, Accountat and Bailiff are almost similar to the procedures obtaining now in courts. Parties to the dispute could engage lawyers to represent their case. Lawyers were supposed to have sufficient knowledge of substantive and procedural law and they render their services for remuneration.

According to rājadharma cases should be examined either by the King or by the chief judge or judges appointed by him. Apart from the chief judge, there should be some sabhyās or assessors in the court of justice. The assessors should be honourable men and competent to discharge the duties. The Smṛtis are almost unanimous in stating that the sabhyās or jurors should be virtuous persons who can handle legal matters according to sacred law. The most interesting feature of the judicial administration was the system of jury. Even the King and the chief justice could not begin the trial of a case, if they were not assisted by a panel of jurors. A number of famous jurists maintain that the King or presiding judge is to be guided by the verdict of the jury. According to Kautilya there shall be an established bench of three judges who shall hold court at frontier posts, sub-district headquarters, and provincial headquarters as necessary. Conduct rules framed for judges were very strict and scrupulously followed. Exemplified character was expected of them. Accountability on the part of judges was made very strict so that they should be doubly careful in awarding decrees so that an innocent person would not suffer.

From very ancient times the disputes or laws have been arranged under eighteen topics. The eighteen topics of law dealt by Manu are adopted in almost all the major smṛtis. Later they

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were classified into two branches as civil and criminal. With regard to these two branches the procedures adopted and the relative remedies provided also differ. In the case of disputes relating to debt, etc., pecuniary relief is provided for. In the case of the topics relating to sāhasa and other offences, punishment is prescribed. In the case of civil disputes it is for the aggrieved party to approach the concerned authorities whereas in the case of criminal offences it is the duty of the King to initiate action on his own or on receiving information from anywhere including the aggrieved. Fourteen topics relating to civil disputes and the four topics relating to the criminal disputes are discussed in detail. Apart from these eighteen major topics, law had been laid down on a variety of subjects under the heading 'miscellaneous matters'. When one of these topics becomes the subject matter of a dispute, a trial will be conducted.

Trial, consisting of four stages, is analyzed in detail. When one is aggrieved by others in a way which is against the established law and the matter is reported to the King; it will be the basis for a legal procedure which has four parts. The plaint is considered to be the first part and the reply the second; the trial is said to be the third part, and the decision the fourth. A plaint should be precise and rich in content, devoid of irrelevant arguments and capable of being understood by the defendant and it should set out the prayer sought against the opponent.

When the plaint is free from defects and the defendant has taken cognizance of its content, he should file his reply. It is stated that a valid reply must fully cover the allegations mentioned in the plaint, be appropriate, free from doubts. The reply may be of four kinds viz., admission, denial, special plea and former judgment. When the party accepts the plaint without producing an exception, this reply should be known as confession or reply by way of admission. If the defendant contradicts the plaint, according to the principles of legal procedure, this is called a reply by way of denial.

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When the defendant replies to the plaint by adducing an exception, it is called a reply by way of stronger exception. Citing an earlier judgement about the same dispute between the same parties shall be construed as a 'reply by way of a former judgement.

Normally plaintiff is not given any adjournment at this stage as he had enough time before filing his plaint. But the defendant's request for adjournment can be considered if it is on genuine grounds. When the plaint and the reply have been filed and the 'Trial' has started, then the statements of both the parties are unalterable. After verification of both the statements the court decides the facts proposed to be established by the respective parties and on whom the burden of proof lays.

The third stage in a legal dispute (vyavahāra) was the trial. During this stage, the parties to a case were required to adduce evidence. Written document, lawful possession and witnesses are described as evidences of a case. After the conclusion of evidence on both sides, the King or the judges, as the case might be, were required to consider the whole case, i.e., the pleadings and the evidence adduced and to deliver judgment according to law and customs, under their signature. Jayapatra is one which incorporates a brief statement of the plaint and the answer; the evidence adduced by the parties; the discussion on the issues involved; the consideration of the arguments advanced by the parties; the law applicable to the case; the opinion of jurors the decision given by the chief justice and other judges and the royal seal.

The main object of the law of evidence is to help the courts to ascertain the truth. Evidence is of two kinds ie., human evidence and ordeals. Human evidence consists of documents, witnesses and possession and the divine evidence is through undergoing ordeals. Evidence of what had actually been seen or heard by a person is admissible. Hearsay evidence is not admissible. The rule laid down by the smṛtis was that the plaintiff or the defendant who asserted

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the existence of facts should adduce evidence to prove word by word the facts in the issue. The statement of a witness motivated by greed, infatuation, fear, friendship, lust, anger, ignorance and innocence is taken to be false. Great sanctity was attached to the act of giving oral evidence before the courts.

Judges were to exhort the witnesses before they give evidence by means of words which praise truth and drive away falsehood. No delay was allowed in examining witnesses as the witnesses are likely to forget important links or facts as time passes. In a conflict among the witnesses, the testimony of the majority should be accepted. There was provision to punish false witnesses. They were cautious in drawing conclusions on the basis of circumstantial evidence since it is mainly connected with the presumptions.

It is stated that he should be considered as a witness who has been a witness to a deed with his own ears or eyes; with his ears if he has heard another man speaking, and with his eyes if he has seen something himself. There were two kinds of witnesses appointed and un-appointed. Appointed witness is one whose name has been entered in the document, whereas the un-appointed witness is one who is not so mentioned. Different kinds of appointed and un-appointed witnesses are dealt in detail. The witnesses shall be of honorable family, straightforward, and unexceptionable as to their descent, their actions, and their fortune. In the case of violence, theft, adultery, defamation and assault, the competence of witnesses shall not be examined too strictly. Parties themselves were responsible to produce witnesses. Provision for payment of subsistence allowance was there. Penalty for failure to give evidence was provided.

Importance of Document and Possession as evidence is discussed in detail. Documents are said to be of two kinds, in one's own handwriting and in that of another person, without witnesses and with witnesses respectively. Various kinds of Documents are

described in smṛti literature. There were seven kinds of documents emanating from the common people and three kinds from the King. The documents issued by the common people are, i) Partition, ii) Gift, iii) Purchase, iv) Mortgage, v) Convention or Agreement, vi) Bondage, vii) Debt. The documents emanating from the King are of three kinds. A document issued by the King under the Royal seal is called Royal edict. This is similar to the present Gazette publication issued by the Government. Of the royal edict there are three divisions - a) dānapatram, Royal Grant, b) Prasādalekha, mark of Royal Favour and c) Jayapatra, Decree. Procedure to establish the authenticity of the document was fool proof.

Possession is of two kinds: with title and without the title. Possession in order to be valid must have five characteristics viz; it must have title behind it, must be of long standing, uninterrupted, free from protest by another person and in the presence of the opponent. When possession has been successively held, even unlawfully, by the three generations it cannot be taken away from the person possessing it in fourth generation.

The evidentiary value of ordeals and the procedure to solemnize the evidence by taking oath are described. When the parties to litigation were unable to prove their case by means of oral or documentary evidence, the courts could allow the parties concerned to prove their case through divine tests or ordeals. Different kinds of ordeals were described. In *bṛhaspatismṛti* it is stated that the balance, fire, water, poison and fifthly, holy water; rice is prescribed as the sixth, hot gold as the seventh and the eighth is called the ploughshare; the ordeal of dharma is the ninth. Procedures to conduct these ordeals were described in detail. Over a period, as per yuga dharma, it was felt that the Ordeals adopted as a means of proof have absolutely no rational basis, but were relied purely on superstition and do not appeal to a rational mind. This is evident from the specific provisions set out later which excluded altogether the ordeal method when human evidence was possible.

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Before recording the oral evidence of a witness, who comes forward to give evidence in any dispute, the smṛti texts provided that an oath should be administered to the witness. This was with the object of introducing certain amount of seriousness and solemnity into the trial and to impress upon the witness that he should speak the truth. This practice is continuing in the present courts also.

Keeping in view of the harmony and welfare of the society 'Crime and Punishment' was given due importance in Ancient Bhārat. The Vedic period throws much light on the subject of crime and the relative punishment. The *ṛgveda* states that the wise made seven limits to the human beings, violating even one of them leads to incur Sin. The *Nirukta* describes the seven sins as: theft, violating an elder's bed, murder of a brāhmaṇa or virtuous person, murder of a fetus, drinking of liquor, repetition of an offence, telling lie as to a sinful matter.

King should award punishment befitting to the criminal acts after fully considering the place, time and capacity and fully looking into the scriptures. This shows the importance given to award proportionate punishment keeping in view the gravity of offence.

Daṇḍanīti: It is the primary responsibility of the King to punish and bring to the proper path castes and guilds when they swerve from their path of dharma. According to Manu the ultimate sanction behind the state is force. If it is not used, the alternative is the law of the jungle ie., matsyanyāya. It is daṇḍa, physical punishment which rules over all the subjects. Same view was expressed in *Mahābhārat.* Punishment protects dharma, artha and kāma (the law, the lawful wealth and lawful desires of human beings) and hence it is called trivargarūpa, the symbol of Dharma, Artha and Kama. Thus the entire social well-being is thus dependent upon it. The principle that the person from higher

status deserves more severe punishment than the one from a lower status was followed.

Besides the primary sources other areas which contribute for the formation of law are dealt in detail. They are śruti, smṛti, śilā, svasya priyam and sadācāra. In addition to these, subsequently, the commentaries, judicial precedents and legislations have played a great role as sources of Hindu Law.

Śruti*:* Though the four Vedās, the six vedāṅgās and the eighteen Upaniṣads are included within the Śrutis, they contain many indirect references to the concepts of law, which were later developed.

Smṛtis: The smṛtis also called as dharmaśāstrās are the abundant sources of Hindu law as it is operative today. Manu and Yājñavalkya practically represent the golden age of the Hindu legal history and Nārada , Bṛhaspati and Kātyāyan*a* indicate the latest epoch in its developments.

In between the Vedic period and the smṛti period the dharmasūtrās followed by Kautilya's *Arthaśāstra* occupy a very important place in the history of Hindu Law. In fact the relevant parts of dharmasūtrās and Kautilya's *Arthaśāstra* are the real legal literature comparable to the modern civil and criminal laws. In the absence of any direction from Śruti or Smṛti texts one should be guided by the pariṣad viz., Assembly.

śilā as consisting in knowledge and sympathy, in thought, word and act, towards all living beings—this is called 'a source of dharma' because such man can better understand Veda.

'Svasya priyam' means 'self-satisfaction'; i.e., the satisfaction regarding the propriety of a certain act, in the minds of such men as are steeped in Vedic tradition.

Custom (sadācāra) was one of the most important and fruitful sources of law according to Manu. The custom is sometimes

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superior to the law provided the essential conditions are fulfilled. The conventions or trade usages formed another source of law. Whatever conventions are settled in accordance with the consent of the people of a country should always be preserved in writing with the Royal Seal.

Other sources such as Legislation and Court judgments are also very important sources especially of modern Hindu law. Strictly speaking, adjudication by the courts is not an independent source of law. But the fact remains that even the courts sometimes make new law in course of the interpretation and application. From 7th century on wards smṛti literature virtually stopped growing. After a gap of two to three centuries the period of legal texts known as commentaries and digests started appearing. Interpretation of smṛti law played a very important part as source of law through the commentaries.

Development of Hindu Law through legal texts is discussed in detail as to how they developed smṛti law and made it more practical in its application. The law and society are most inextricably connected with each other. As far as west is concerned, the sociological method of studying law and jurisprudence is of recent origin. Whereas this aspect was well recognized in Ancient Bhārat and the fact that its growth depends on the progressive changes that take place in the society was well appreciated. As time passes many changes took place resulting in difficulty to apply the smṛti concepts to the developing society. Taking the principles of *mīmāṃsa* as means of interpretation the eminent commentators made smrit law more workable and practical in its application. It is well known fact that the Hindu Law got divided into two branches - *Mitākṣarā* and the *Dāyābhāga*. *Mitākṣarā* system was propounded by Vijñāneśvara and the *Dāyābhāga* system by Jimuthavahana. The difference between these two schools arose because of the two different interpretations given by these

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commentators about the inheritance of property. According to Vijñāneśvara inheritance is by nearness of blood or propinquity, and it has nothing to do with the right to give śrāddha. He takes the view that the right of son over ancestral property accrues by virtue of birth. Whereas Jimutavahana has followed the traditional ancient 'Hindu law- approach' that the person who has the right to give śrāddha to a deceased, has the right to inherit his property. Thus, the development of law took place on account of different interpretations.

During British rule the English Judges made a great contribution to the development of Hindu law by accepting the views expressed in the commentaries and digests of eminent jurists. Subject to the modifications made by Legislation, the Hindu law continued to be the personal law governing the Hindus prior to and after India's independence on 15th August 1947.

'Human Rights' which became an important segment of international law are discussed in detail. With the birth of United Nations Organization only, the Human Rights were highlighted throughout the world. Whereas in ancient India Human Rights were recognized from times immemorial. The Concept 'Dharma' which is a comprehensive term for all the human rights and duties, the observance of which was regarded as essential for securing peace and happiness to individuals and the society as well. The ancient philosophers of this land preferred to establish a duty-based society where the right given to an individual emanates from the duty entrusted to others in accordance with the principles of dharma. Thus, the concept of welfare state was evolved and practiced in Ancient Bhārat. Details of various Human Rights are discussed in detail.

Comparative aspect of various provisions obtaining between both the ancient and the modern judicial systems is examined in depth and brought out many similarities. Accordingly inferences

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are drawn as to how the ancient judicial system could become a primary source for the present one.

Information culled out from Vedic literature particularly from *ṛgveda* establishes the origin of kingship in those remote times and how the King used to be under the grace of assemblies ie., Sabhā and Samithi. The procedures followed by the King in dealing with the crime and punishment, clearly indicate the exercise of his judicial authority basing on the principles of dharma. *ṛgveda* is accepted as the most ancient treatise in the universe by the western thinkers like Arthur A. Mac Donell and others. It only establishes that the judicial system of Bhārat had its roots in such remote past as Vedic period.

Therefore, it can be said that the judicial system of India is the most ancient of all the judicial systems obtaining in the world and it forms the fountain head for the extant judicial system operating in our country.

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Chapter - II

Evolution of Law in Ancient Bhārat

From the social context of Vedic period we find the existence of laws to maintain orderliness in villages. To appreciate as to how Hindu Judicial system has evolved in ancient India, beaming its influence into future times, one has to trace the origin of law to the Vedic period. The Vedic literature is the most ancient record of the world and forms the source of the earliest history of the mankind as a whole. In this context some of the views in relation to the origin of Vedic period are worth noted. P.V. Kane in his monumental treatise *History of Dharmaśāstra* observes,

'Some hymns of the ṛgveda, the Taittiriya Saṃhitā and brāhmaṇa and the Atharvaveda may possibly go back to a period earlier than even 4000 B.C. and some of the Upaniṣads, even from among those that are regarded as the earliest ones may be later than 1000 B.C.'[1]

According to *saṃskṛtasāhityacaritra* of Dr. Mudigonda Gopalreddi and Dr. Sujatha:

*Max Muller assumed that Vedic literature has four parts as: S*ūtrā *period 600-200 B.C; brāhmaṇa period 800-600 B.C; Mantra period 1000-800 B.C.; ṛgvedic Preiod 1200-1000.B.C. While accepting that it is very difficult to fix the time of Vedic period he observed that Vedās are the first works in the world-literature. After that, Western scholars*

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Col Brook, Wilson, Keeth, and Macdonel have agreed with the view of Max Muller. Another Western scholar Winternitz first opined that Vedās belong to 2500 B.C and later he himself realized that it is very difficult to fix the time of origin of Vedās. Bālagaṃgādharatilak basing on astrology fixed the Vedic period as 6500 B.C [2]

Dr. S.B. Raghunāthācārya, a renowned Sanskrit scholar has brought out in '*ārṣavijñāna sarsvam*' of Tirumal Tirupati Devasthanams that:

Max Muller opined that Vedās formed before 1200 B.C.; some others surmised that they formed before 3000 B.C.;... Pavagi scholar thought that Vedās belong to 7000 B.C. Whereas Avinash Chandradas fixed that Vedās formed between 25000 B.C and 75000 B.C. sanātana Dharma believers and traditional scholars have not agreed any of these views. They believe that the Vedās are eternal and they as heap of sound appear and disappear along with the appearance and disappearance of yugās. [3]

It is traditionally believed that the saints with their evolved consciousness could draw the hymns of Vedās from the creation and able to preserve by chanting from times immemorial. Hence they are eternal. The literature of the Vedās is termed śrutiḥ, meaning what has been heard and is not the work of man.

About the origin and the character of the Vedās are explained in the *The splendor of 'kṛṣṇayajurveda' -A monograph* as under: [4]

The holy Vedās are the principal and primary sacred texts of the followers of sanātanadharma. They are believed to be eternal truths of the cosmos revealed to the sages of yore. They also believed to be of great antiquity dating to the beginning of time itself.p.11

Sanātanadharma is the way of life of people, based on dharma, from times immemorial. It reflects the eternal principles of the universe.p.14

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Dharmarāja Adhvarīndra *the author of Vedāntaparibhāṣā, states that at the time of creation of this universe the Supreme God brought out the Veda in the same way and with same sequence of contents as it was existing during earlier creation.p.24*

सर्गाद्यकाले परमेश्वरः पूर्वसर्गासिद्ध वेदानुपूर्वी समानानुपूर्विकं वेदं विरचितवान्।)

sargādyakāle parameśvaraḥ pūrvasargāsiddha vedānupūrvī samānānupūrvikaṃ vedaṃ viracitavān।)

The characteristic of Veda is defined as indicating that the word Veda is the name given to the combination of mantra and brāhmaṇā *segments.p.21*

मन्त्रब्राह्मणात्मको हि वेदः।

mantrabrāhmaṇātmako hi vedaḥ।

Sāyanāthācārya *defined Veda as The book that gives spiritual clues for achieving the desired objects and for getting rid of the undesired objects is called Veda.p.21*

इष्टप्राप्ति अनिष्टपरिहारयोः अलौकिकमुपायं यो ग्रन्थः वेदयति स वेदः।

iṣṭaprāpti aniṣṭaparihārayoḥ alaukikamupāyaṃ yo granthaḥ vedayati sa vedaḥ।[4]

They are reported to have been segregated later into four *Vedās* ie., *ṛg, Yaju, sāma* and *Atharva* by sage vedavyāsa. Tatacharya in his treatise *Vedakālīna janatantrasthānāni* says:

In chāndogyopaniṣad that at first ṛgveda emanated from fire and second sāmaveda from sun and third yajurveda from air. Jaimini and Bādarāyaṇa have established the divinity of Vedās in their aphorisms.[5]

The Vedās are divided as Saṃhitā, Brāhmaṇam, āraṇyakam, and Upaniṣads. Saṃhitā is Vedic text proper. The main subject of the Saṃhitā consists of injunctions of sacrificial acts and the several details bearing upon those acts. The Brāhmaṇam, is a ritualistic

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commentary with explanations on the injunctions contained in the Saṃhitā. āraṇyakam deals with the transition from ritual to philosophical thinking and Upaniṣad, which is philosophical text. Vedās are a multitude of knowledge and a treasure house of wisdom. They aim at the welfare of the human beings and provide guidance as to how they have to conduct themselves with high moral standards as law-abiding citizens. They defy time as far as their utility is concerned and they are permanent in their stature and position. Vedās are the basis for Bhāratīyasaṃskṛti . They teach dos and don'ts of a proper conduct and show what is right and what is wrong. They spread knowledge, provide comfort and peace.

The institutions of law and justice are based on them. They are taken as standard to know whether a particular thing is lawful or unlawful. *Manusmṛti, Yājñavalkyasmṛti* and other such works describing the rules of justice and conduct are based on Vedās. Where there is a clash on a particular issue between the standpoint of śruti and smṛti, the view expressed by śruti will be taken as correct. Such extraordinary importance is given to Vedās since they possess divine origin and not compiled by human beings as in other cases like smṛtigranthās.

In *The splendor of Kṛṣṇayajurveda-A monograph* it is mentioned that:

Veda is that which throws light on those means of emancipation or on those superhuman agencies who can help in the emancipation, which cannot be known or identified by the other two means of knowledge, viz., perception and inference. It is in, other words, a collection of sounds that reveal super-mundane matters or that which enables us to perceive the supra-sensual phenomenon.[6]

प्रत्यक्षेणानुमित्या वा यस्तूपायो न विद्यते।
एनं वेदन्ति वेदेन तस्माद् वेदस्य वेदता।। [6]

pratyakṣeṇānumityā vā yastūpāyo na vidyate।
enaṃ vedanti vedena tasmād Vedāsya vedatā।।

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Vedās occupy an important and elevated position and are taken as basic standard in establishing whether a particular issue is in conformity with the rule of law or not.

The Vedās include auxiliary works called vedāṅgās which are six in number: Phonetics, Prosody, Grammar, Nyruktam (Etymological definition of words found in Vedās), Astrology), Kalpa (Ritual ceremonies). Further, eighteen Upaniṣads are considered as part of and supplement to the respective Vedās. The Vedās Vedāṃgās and Upaniṣads together constitute the śṛti , are mainly religious books. Though they do not deal directly with the concept of law as is understood now, in modern sense yet provide many indications in relation to the various aspects of law. The ultimate traditional source of all law, and necessarily the oldest historical material is the Vedās.

It may be observed here that some of the Western thinkers and modern historians did not believe in the divinity of Vedās. They are convinced of the historic aspects of Vedās as most ancient, particularly *ṛgveda* as the oldest treatise in the world. They also showered praises on the Sanskrit language through which our cultural heritage and Bhāratiya wisdom (*bhāratīyajñānabhaṇḍāram)* found expression.

Arthur A. Macdonell in his book *A History of Sanskrit Literature* says:

Since the Renaissance there has been no event of such world-wide significance in the history of culture as the discovery of Sanskrit literature in the latter part of the eighteenth century. ....'first ṛgveda mantras, next sāma mantras, after that Yaju mantras and lastly Atharva mantras have come into existence'. By far the most important as well as the oldest- for it is the very foundation of all Vedic literature- is the ṛgveda, the "Veda of verses" (from rich, " a laudatory stanza"), consisting entirely of lyrics, mainly in praise of different gods.[7]

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Tata Charya in his book *'vedakalina janatantrasthānāni' observes* that:

Whatever it may be historically all have accepted that before the context of Greece Vedās existed. Their antiquity is unequivocally established and it is confirmed that Vedās are oldest of all the treatises in the world.[8]

Aaccording to Jaimini as mentioned in *Pūrvamīmāṃsa and vedānta:*

Veda is based upon its own eternal and immutable character. What is good for man can be learnt from the Veda; whatever Veda says must be true.[9]

Vedās, contain a treasure of teachings whose practical utility bore upon different periods of time in providing basic information as to how the concept of law emerged and progressed in ancient India.

The Vedās recorded not only the religion of the Vedic people, but also details of their lives that give us a look at their cultural, political and world view. Written down between 1500 and 1000 BC these texts, composed and transmitted orally from times immemorial consist of hymns, myths and rituals. According to Kumkum Roy as mentioned in the book *Ancient India.*

Early Vedic literature (which pertains to the period 1500-1000 B.C), consists primarily of Samhita of the ṛgveda, comprising 1028 hymns in praise of various gods, intended to be used as a means of invoking the deities and soliciting their support.[10]

Over the course of the Vedic period, a transition was made from a cow-based herding economy to an agrarian one. The social structure of Vedic India had a number of important features. It appears that the Government in the remote past was largely by the rule of chiefs, but as time went on these chiefs became Kings, and their territories, kingdoms. The word for chief was raja, and though

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the Vedās tell us little of the political situation, it can be inferred that the early government was a clan based system, which eventually became a true government, with taxes and a bureaucracy. These small kingdoms were widely separated and had little contact with one another, although they shared many cultural principles. It is believed that Kings were coming from god, and that the King was to be respected as a god himself. It was the King's duty to rule the citizens and maintain law and order in perfect balance, so that people could strive for evolution of consciousness with ease.

Origin of Kingship: In *ṛgveda (Aithareya brāhmaṇa)* it is stated that:

Gods got defeated in a battle against demons and approached Indra with a request to protect them from the atrocities of demons. They thought that owing to lack of proper leadership they got defeated in the battle and sought the help of Indra. Indra fought against the demons and protected the gods. On account of this he was accepted as King in Vedic period.[11]

उद् वृहरक्षः सहमूलमिन्द्र वृश्चा मध्यं प्रत्यग्रं शृणीहि।
आ कीवतः सललूकं चकर्थ ब्रह्मद्विषे तपुषु हेतुमस्य।।

ud vṛharakṣaḥ sahamūlamindra vṛścā madhyaṃ pratyagraṃ śṛṇīhi।
ā kīvataḥ salalūkaṃ cakartha brahmadviṣe tapuṣu hetuṃasya।।[11]

In *ṛgveda* period, King and kingdom are referred to by the word Kshatra indicating the origins of political and administrative setup in ancient India. At the very beginning, keeping in view the welfare of the society, to administer the various activities of the people, kingship was created by the saints who possessed divine wisdom. They have highly evolved conscious and possess transcendental knowledge. They have the power of penance and austerity. For this purpose they have entered into a vow. For the protection of the

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King they created power. People engaged themselves in various affairs at individual and family levels and there was nothing to ensure their safety. To administer properly their affairs institution of kingship was created. Realizing that the kingship was created for their safety people accepted the pious position of the King. They worshipped him and respected him. Kingship is referred to many times in *ṛgveda* mantras. It is mentioned in *ṛgveda* that:

Divine power was attributed to him from various gods .For his protection there is a prayer.

न हि ते क्षत्रं न सहः न मन्युः वयश्चानामी पतयन्त आपुः।
नेनू आपो अनिमिषं चरंत्तीर्नये वातस्य प्रमिन न्त्यभम्। [12]

na hi te kṣatraṃ na sahaḥ na manyuḥ vayaścānāmī patayanta āpuḥ।
nenū āpo animiṣaṃ caraṃttīrnaye vātasya pramina ntyabham।

This way the divinity of kingship is seen in *ṛgveda* mantras. P.V. Kane also states that:

"The germ of the theory of Divine Right of Kings probably goes back even to the ṛgveda. He refers to the hymn of King Trasadasyu, son of Purukutsa. Some of the ideas therein are startling enough. He says 'the gods rely on the might of Varuna, while I am the lord of the people; I am Indra and Varuna, I am the wide and the deep Heaven and Earth , I am the son of Aditi"[13]

अहमिन्द्रोवरुणस्ते महित्वोर्वी गभीरे रजसी सुमेके।
त्वष्टेव विश्वाभुवनानि विद्वान् त्समैरयं रोदसीधारयंच।। [13]

Ahamindrovaruṇaste mahitvorvī gabhīre rajasī sumeke।
tvaṣṭeva viśvābhuvanāni vidvān tsamairayaṃ rodasīdhārayaṃca।।

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Here there is an explicit claim by a king to be identical with the mightiest and greatest gods of the Vedic pantheon.....Visvarupa on Yaj. 1. 350 quotes a long Vedic passage (āgama in which it is stated that:

"The gods said to Prajapati 'we shall arrange for a king in human form by taking from the moon, the sun, Indra, Visnu, Vaisravana (Kubera) and Yama respectively majesty, brilliance, valour, victoriousness, liberality and control" and that the king thus formed asked the gods to give him Dharma as his friend and that then he would protect the people and then the gods made Dharma (i.e. (दण्डः) danda) his friend." [14]

Tracing the path of the evolution of the institution of Kingship, in his book *'State And Government In Ancient India'* A.S. Atlekar, a well known authority on ancient India observed that:

Society in Vedic period was patriarchal. Several kulas (families) made a vis (a local community) and several visas a jana (tribe). Those among the kulapatis, who were noted for their strength and leadership used to become vispatis. From among the vispatis, one would rise to the position of the janapati for similar qualities, sometimes demonstrated in the chariot race."..."Early Indian speculations and the known evolution of the Hindu family, therefore, show that kingship arose out of the patriarchal atmosphere prevailing in society[15]

In *ṛgveda*, there are references to sole rulers (एकरथ्) (ekarats), great rulers (अतिरथ्) (atirath) and emperors (सम्राज्ञ्) (samrājñ)

निषसाद धृतव्रतो वरुणःपस्याअस्वा। साम्राज्याय सुक्रतुः।।
इदं कवेरादित्यस्य स्वराजो विश्वानि सान्त्यभ्यस्तु मह्ना।

उवोचिथ हि मधवन् देष्णं महो अर्बस्य वसुनो विभागे।
सः नः प्रजायै हर्यस्व मृळयेन्द्र मा नो रीरिषो मा परा दाः।[16]

Niṣasāda dhṛtavrato varuṇaḥpasyāasvā।
sāmrājyāya sukratuḥ।।

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idaṃ kaveradityasya svarājo
viśvāni sāntyabhyastu mahnā।
Uvocitha hi madhavan deṣṇaṃ maho
arbasya vasuno vibhāge।
saḥ naḥ prajāyai haryasva mṛḷayendra mā
no rīriṣo mā parā dāḥ।

A.S.Altekar, in his treatise, *State and Government in Ancient India* says that:

It is no doubt true that some of these epithets are applied to gods, but there can be no doubt that their counterparts existed on the earth as well. [17]

The *Atharvaveda* describes the king as lord of riches, the chief of the people and the most prominent among the warriors. It also prays that the king may have power, luster and control over the nation:

Exalt and strengthen this prince, O God, Make him sole lord and leader of the people. Scatter his foes; deliver all his rivals into his hand in struggles for precedence. Let him be treasure-lord of goodly treasures; let him as king be master of the people. Grant unto him great power and might, O God, and strip his enemy of strength and vigour". "Like two milch-kine yielding milk in incessant warm showers, grant him wealth, O Heaven and Earth. May he as king be God's well-beloved, the darling of the kine, the plants, the cattle. [18]

इममिन्द्र वर्धय क्षत्रियं म इमं विशामेकवृषं कृणु त्वम्।
निरमित्रानक्ष्णुह्यस्य सर्वास्तान् रन्धयास्मा अहमुत्तरेषु।।

अयमस्तु धनपतिर्धनानामयं विशां विशपतिरस्तु राजा।
अस्मिन्निन्द्र महि वर्चांसि धेह्यवर्चसं कृणुहि शत्रुमस्य।।

अस्मै द्यावापृथिवी भूरि वामं दुहाथां घर्मदुघेइव धेनू।
अयं राजा प्रिय इन्द्स्य भूयात् प्रियो गवामोषधीनां पशुनाम्।। [18]

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Imamindra vardhaya kṣatriyaṃ mā imaṃ
viśāmekavṛṣaṃ kṛṇu tvam।
niramitrānakṣṇuhyasya sarvāstān randhayāsmā
ahamuttareṣu।।

Ayamastu dhanapatirdhanānāmayaṃ viśāṃ
viśapatirastu rājā।
asminnindra mahi varcāsi dhehyavarcasaṃ kṛṇuhi
śatrumasya।।

Asmai dyāvāpṛthivī bhūri vāmaṃ duhāthāṃ
gharmadugheiva dhenū।
ayaṃ rājā priya indsya bhūyāt priyo
gavāmoṣadhīnāṃ paśunām।।[18]

"O King, powerful like the Sun, be our friend, conqueror of foes, yoked with brave, victorious heroes, firm and strong in body. Thou art the possessor of various parts of Earth, make us strong. May thy Commander-in-chief win foes deserving defeat![19]

वनस्पते वीड्वअङ्गो हि भूया श्रस्मत्सखा प्रतरण सुवीरः।
गोभिः संनद्धो असि वीडयस्वास्थाता ते जयतु जैत्वानि।। [19]

vanaspate vīḍvaaṅgo hi bhūyā śrasmatsakhā
prataraṇa suvīraḥ।
gobhiḥ saṃnaddho asi vīḍayasvāsthātā te jayatu jaitvāni।

"O commander, conquer the yonder troops of the enemy. May our heroes be victorious. Let the war drum beat loudly with the furling of the flag. Let our cavalry march forth. Let our car-warriors be triumphant!"[20]

प्रामूं जयाभि मे जयन्तु केतुमद् दुन्दुभिर्वावदीतु।
समश्वपर्वणाः पतन्तु नो नरोऽस्माकमिन्द्र रथिनो जयन्तु।। [20]

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prāntuṃ jayabhi me jayantu ketumad
dundubhirvāvadītu।
samaśvaparvaṇāḥ patantu no naro'smākaminr rathino
jayantu।।

O King, thou thyself buildest and advancest this state. May this state a peerless paradise make full progress! The mighty king, equipped with knowledge rules over it. The learned put the state in the hands of able and efficient persons[21]

उपास्तरीरकरो लोकमेतमरुः प्रथतामसमः स्वर्गः।
तस्मिञ्छ्रयातै महिषः सुपर्णो देवा एनं देवताभ्यः प्र यच्छान्।। [21]

upāstarīrakaro lokametamaruḥ
prathatāmasamaḥ svargaḥ।
tasmiñchrayātai mahiṣaḥ suparṇo devā enaṃ
devatābhyaḥ prayacchān।।

Having evolved the concept of enforceability of the law through the institution of Kingship, ancient Indian jurists proceeded to define the law. Law was recognized as a mighty instrument necessary for the protection of individual rights and liberties. Whenever the right or liberty of an individual was encroached by another, the injured individual could seek the protection of the law with the assistance of the King, however powerful the opponent might be. The power of the King to enforce the law or to punish the wrong doer was recognized as the force behind the law which could compel implicit obedience to the law. After declaring that kṣatra power (ie., the King) was created by the creator, *Bṛhadāraṇyaka Upaniṣad* proceeds to state, finding that the mere creation of kingship was not enough, the most excellent Dharma (law), a power superior to that of the King, was created to enable the King to protect the people, and gives the definition of law (dharma) as under:

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Law is the King of kings, nothing is superior to law, the law aided by the power of the king enables the weak to prevail over the strong.[22]

tadetat kṣatrasya kṣatraṃ yaddharmaḥ।
tasmāddharmātparaṃ nāsti।
atho abalīyān balīyāṃsamāśaṃsate dharmeṇa।
yathā rājñā evam।।[22]

tadetat kṣatrasya kṣatraṃ yaddharmaḥ।
tasmāddharmātparaṃ nāsti।
atho abalīyān balīyāṃsamāśaṃsate dharmeṇa।
yathā rājñā evam।।

Commenting on the above provision, Dr. S. Radhakrishnan in his book *Principal Upaniṣads*

Observes:

"Even kings are subordinate to Dharma, to the Rule of law"[23]

Concept of ṛtam (Cosmic Order): ṛtam is the basis of Indian thinking about law. It is mentioned in *ṛgveda* that:

Divinity manifests itself through splendor and through law. The all pervading Being is born of eternal law and is eternal law itself.[24]

हंसः शुचिषद् वसुरन्तरिक्षसद्होता वेदिषदतिथिर्दुरो णसत्।
नुषद् वरसदृतसद् व्योमसदब्जा गोजा ऋतजा अद्रिजा ऋतम्।।[24]

haṃsaḥ śuciṣad vasurantarikṣasaddotā
vediṣadatidhirduro ṇasat।
nuṣad varasadṛtasad vyomasadabjā
gojā ṛtajā adrijā ṛtam।।

In its literal meaning ṛtam (ऋतम्) is the course of things. It is understood as ethical, religious, legal and social order. ṛtam also means 'proper' or 'right'; a derivative of ṛtam (ऋतम्) means

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literally straight and thus implies right conduct. In the *ṛgveda* it is observed that:

ṛtam denotes the supreme transcendental law or the cosmic order by which the universe and even the gods are governed and which is intimately connected with sacrifice. [25]

आदित् ते विश्व क्रतुं जुषन्त षुष्काद् यद् देव जीवो जनिष्ठाः।
भजन्त विश्वे देवत्वं नाम ऋतं सपन्तो अमृतमेवैः।।

नव्यं तदुक्थ्यं हितं देवासः सुप्रवाचनम्।
ऋतमर्षन्ति सिन्धवः सत्यं तातान सूर्योवित्तंमे अस्यरोदसी।।

ऋतं च सत्यं चाभीद्धात् तपसोऽध्यजायत।
ततो रात्र्यजायत ततः समुद्रो अर्णवः।। [25]

ādit te viśva kraratuṃ juṣanta
ṣuṣkād yad deva jīvo janiṣṭhāḥ।
bhajanta viśve devatvaṃ nāma ṛtaṃ sapanto
amṛtamevaiḥ।।

navyaṃ tadukthyaṃ hitaṃ devāsaḥ supravācanam।
ṛtamarṣanti sindhavaḥ satyaṃ
tātāna sūryovittaṃme asyarodasī।।

ṛtaṃ ca satyaṃ cābhīddhāt tapaso'dhyajāyata।
tato rātryajāyata tataḥ samudro arṇavaḥ।।

In our context, Vedās are the basic frame-work to which all other *śāstrās* subserve. *śāstrās* draw their essence from the Vedic tradition. The Veda postulates two concepts, 'satyam' and 'ṛtam'. The word satyam is in relation to the ultimate truth. It is never changing, in the past, present or future whereas, ṛtam is 'Yuga Dharma'. It is mentioned in *kauṇḍinyasmṛti* that:

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śaṃkarācārya in his commentary on śāntimantraḥ 'Santi mantra' of taittirīya Upaniṣad explains that ṛtam *is equivalent to the word 'right' and is subject to the vagaries of social changes, as accepted by śāstrās of the society, at a given point of time."*[26]

'यथाशास्त्रं यथा कर्तव्यं बुद्धौ सुपरिनिश्चितम् ।.[26]

yathāśāstraṃ yathā kartavyaṃ buddhau supariniścitam ।

In this regard Ramanuja Prasad in his book *Veda a way of life* observes that:

ṛtam *is the rule of operation or interfaces. The 'Order' in general has many aspects that go into consolidation of the Dharmaśāstrā - ethical, cosmic, aesthetic, rites, social order, fate and governance. The ethical aspect of the 'Order' has wider scope than the truth, as it includes justice and goodness and is almost synonymous with dharma as a moral base. If the truth is the first essential of the dharma, Order* ṛtam *stands to be the next essential of the eternal order. If the truth upholds the earth, so does the Order support the other extension- the heavens. The 'Order' is the operation of cosmic plans of the very concept of divinity and the triumph of light over darkness. In the moral plane 'Order' leads to the triumph of good over the evil so there is harmony between the natural life and living beings. To be more precise, this 'Order' eliminates chaos in the cosmos and brings integration on matters into harmony with the aesthetic concept of the eternal law, which leads to the expression of beauty and tenderness. Truth' and 'Order' are the expressions of the value and valour of the brāhmaṇa and kṣatriya that uphold socialistic order. In society, the brāhmaṇa provides knowledge, food for the mind and value in life, whereas kṣatriyas are strong, protecting the territory from external aggression and maintaining internal law and order.*

This is the Bird's eye vew of Vedic society wherein the working class and Vaishyas too have their roles to play, as stipulated in the four Varna societies. Among the deities, Fire, Agni represents the brāhmaṇa

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ideals and Varuna and Indra represent the spirit of kṣatriya. Thus there are many hymns and prayers by seekers asking for such virtues from these deities.[27]

In later Vedic age, law began to be associated with the King and the State. Law of contract and crime must have been the early expressions of ṛtam which preserved the physical as well as the social order. Acts opposed to ṛtam are then deviations from ordered living in society. Indian thought, from its earliest stages, expresses the idea of the 'supremacy of law'.

Yajña: Vedās and yajña go together. Yajña expresses an aspiration for an ideal social life which is sought in the Vedic prayer. In *ṛgveda* it is stated that:

Oh human beings, all of you should, live together with mutual cooperation, converse with each other in a friendly manner, acquire knowledge having common ideals of life. All your prayer and desires be similar and for common good, all your get-togethers be without separatist feeling, all of you be united in thought, word and deed. Let there be oneness in your resolutions, hearts and minds and let the strength to live with mutual cooperation be firm in you all.[28]

संगच्चध्वं सं वधध्वं सं वो मनांसि जानताम्।
देवा भागं यधा पूर्वे संजानाना उपासते।।

समानो मंत्रः समितिः समानी समानं मनः सह चित्तमेषाम्।
समानं मंत्रमभिमंत्रये वः समानेन वो हविषा जुहोमि।।

समानी व आकूतिः समाना हृदयानि वः।
समानमस्तु वो मनो यथा वः सुसहा सति।।[28]

saṃgaccadhvaṃ saṃ vadhadhvaṃ saṃ
vo manāṃsi jānatām।
devā bhāgaṃ yadhā pūrve saṃjānānā upāsate।।

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samāno mamtrah samitih samānī samānam manah
saha cittameṣām।
samānaṃ maṃtramabhimaṃtraye vaḥ samānena vo
haviṣā juhomi॥

samānī va ākūtiḥ samānā hṛdayāni vaḥ।
samānamastu vo mano yathā vaḥ susahā sati॥

Yajña contains in itself all the main elements of a system, organization and must have been an original mode of ancient Indian life even before emergence of political and other institutions like territorial state, private property, etc. It was based on common living and equitable distribution of the things available. Law is first reflected, in the yājñik way of common social life. It is a mixture of religion, legend and custom. It is only at a later stage that state comes into being and law begins to associate with it and then it is institutionalized for the purpose of maintaining 'dharma' and bring orderliness into life within the frame work of morals, religion and law. It is stated in *Yajurveda* that:

In Yājña 'Agnin' fire was treated as messenger to carry the prayers to the Gods. Prayers are sought requesting to provide the four purusharthas ie., dharmārthakāmā and mokṣa. *In this dharma is the first which keeps the world in order.*[29]

यज्ञेन यज्ञमयजन्त देवास्तानि धर्माणि प्रथमानि आसन्।[29]

yajñena yajñamayajanta devāstāni dharmāṇi
prathamāni āsan।

The concept of law, as understood in ancient India, is based on dharma and the origin of it can be found in our Vedās. In *Satapatha brāhmaṇa of Sukla Yajurveda* it is said that:

Dharma was the sovereign over the sovereign and it may therefore be said that the sovereignty vested in it[30]

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तत् (ब्रह्म) श्रेयोरूपमत्यसृजत् धर्मम्। तदेतत्क्षत्रस्य क्षत्रम् यद्धर्मः।
तस्माद्धर्मात्परं नास्ति। [30]

tat (brahma) śreyorūpamatyasṛjat dharmam।
tadetatkṣatrasya kṣatram yaddharmaḥ।
tasmāddharmātparaṃ nāsti।

In *Manusmṛti* it is said that *only he knows the Veda and nobody else who supports through logic the preaching of ṛṣis, not contradictory to the Vedās and śāstras.* [31]

आर्षं धर्मोपदेशं च वेदशास्त्राऽविरोधिना।
यस्तर्केणानुसंधते स धर्मं वेदनेतरः।। [31]

ārṣa dharmopadeśaṃ ca vedaśāstrā>virodhinā।
yastarkeṇānusaṃdhate sa dharmaṃ vedanetaraḥ।।

The word 'Dharma' (धर्मः) in Sanskrit is derived from the root (धृ) 'dhru'. Dhru (धृ) means to wear, support or to sustain. Ancient Indians believed that dharma only sustains society. The word dharma is being used to mean responsibility, justice, righteousness, law, religion, and morality. Dharma is having a wider connotation than what we understand by the term 'law'. In fact the two great epics *Rāmāyaṇa* and *Mahābhārat* stand out as classic sources for exemplified concepts of dharma. About the definitions of Dharma, several definitions have been quoted in the *History of dharmaśāstra* by Dr. P.V. Kane. The most important definition is that of Jaimini, in *Pūrvamīmāṃsa* who defines Dharma as:

Energising (driving) is the characteristic of Dharma. 'a desirable goal or result that is indicated by injunctive Veda passages' [32]

चोदन लक्षणो अर्थो धर्मः।। [32]

codana lakṣaṇo artho dharmaḥ।।

This does not speak of law, as is understood now by that term but it gives the basis of it. Sanskrit word Dharma is a word of the

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widest import. There is no corresponding word in any language. *Mahābhārat* contains a discussion on this topic. On being questioned by Yudhistira about the meaning and scope of Dharam, Bhishma states that:

"It is most difficult to define Dharma. Dharma has been explained to be that which helps the uplift of living beings. Therefore that which ensures welfare of living beings is surely Dharma."[33]

तादृशो अयमनुप्रश्नो यत्र धर्मः सुदुर्लभः।
दुष्करः प्रतिसंख्यातुं तत् केनात्र व्यवस्यति।।

प्रभवार्थाय भूतानां धर्मप्रवचनं कृतम्।
यः स्यात् प्रभवसंयुक्तः स धर्म इति निश्चयः।।

धारणाद् धर्ममित्याहुर्धर्मेण विधृताः प्रजाः।
यः स्याद् धारणसंयुक्तः स धर्म इति निश्चयः।।[33]

tādṛśo ayamanupraśno yatra dharmaḥ sudurlabhaḥ।
duṣkaraḥ pratisaṃkhyātuṃ tat kenātra vyavasyati।।

prabhavārthāya bhūtānāṃ dharmapravacanaṃ kṛtam।
yaḥ syātprabhavasaṃyuktaḥ sa dharma iti niścayaḥ।।

dhāraṇād dharmamityāhurdharmeṇa vidhṛtāḥ prajāḥ।
yaḥ syād dhāraṇasaṃyuktaḥ sa dharma iti niścayaḥ।।

Madhavacharya, in his commentary on *Parāśarasmṛti*, has precisely explained the meaning of Dharma as referred to in *Legal and Constitutional History of India:*

"Dharma is that which sustains and ensures progress and welfare of all in this world and eternal bliss in the other world. The Dharma

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is promulgated in the form of commands positive and negative i.e. vidhiḥ and niṣedhaḥ"[34]

अभ्युदय निःश्रेयसे साधनत्वेन धारयति इति धर्मः।
स च लक्षण-प्रमाणाभ्यां चोदनासूत्रैर्व्यवस्थापितः।।[34]

abhyudaya niḥśreyase sādhanatvena
dhārayati iti dharmaḥ।
sa ca lakṣaṇa-pramāṇābhyāṃ
codanāsūtrairvyavasthāpitaḥ।।

Dharma embraces every type of righteous conduct covering every aspect of life, essential for the sustenance and welfare of the individual and the society. *taittirīya samhita* says that:

"Dharma constitutes the foundation of all the things in the world. People respect one who follows dharma. Dharma protects from sinful thoughts and actions. Everything in this world is based on dharma. Dharma, therefore, is considered supreme."[35]

धर्मो विश्वस्य जगतः प्रतिष्ठा।
लोके धर्मिष्ठं प्रजा उपसर्पन्ति।
धर्मेण पापमपनुदति। धर्मे सर्वं प्रतिष्ठितम्।
तस्माद्धर्मं परमं वदन्ति।। taittirīya Saṃhitā [35]

dharmo viśvasya jagataḥ pratiṣṭā।
loke dharmiṣṭaṃ prajā upasarpanti।
dharmeṇa pāpamapanudati। dharme sarvaṃ pratiṣṭitam।
tasmāddharmaṃ paramaṃ vadanti।। taittirīya
Saṃhitā.[35]

Basic aspects of Dharma as mentioned in *Manusmṛti* are:

Non-violence, truthfulness, not coveting the property of others, purity, and control of senses are, in brief, the common Dharma for all the varnas (वर्णाः). [36]

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अहिंसा सत्यमस्तेयं शौचमिन्द्रियनिग्रह।
एतं सामासिकं धर्म चातुर्वर्णेऽब्रवीन्मनुः।।[36]

ahiṃsā satyamasteyaṃ śaucamindriyanigrahaḥ।
etaṃ sāmāsikaṃ dharma cāturvarṇe'bravīnmanuḥ।।

It is further stated that:

Dharma protects those who protect it. Those who destroy Dharma get destroyed. Therefore Dharma should not be destroyed so that we may not be destroyed as a consequence thereof.[37]

धर्म एव हतो हन्ति धर्मो रक्षति रक्षितः।
तस्माद्धर्मो न हन्तव्यो मा नो धर्मो हतोऽवधीत्।।[37]

dharma eva hato hanti dharmo rakṣati rakṣitaḥ।
tasmāddharmo na hantavyo mā no dharmo hato'vadhīt।।

***Sabhā* and Samithi:** The *Vedās* do not speak much about the judicial institutions. The two terms we get in *ṛgveda* are sabhā (सभा) and Samiti. Two more words occur in *ṛgveda* which seem to refer to lower courts. They are:

"Vraja" and "Kula" headed by Vrajapati and Kulapa.[38]

परि त्वासते निधिभिः सखायः कुलपा न व्राजपतिं चरन्तम् ।।[38]

pari tvāsate nidhibhiḥ sakhāyaḥ kulapā na
vrājapatiṃcarantam ।।

The Kula seems to consist of several branches of a family. Many such Kulas may have constituted one Vraja. The later Vedic literature inherited these terms from *ṛgveda*. In *śuklayajurveda* it is stated that:

"The King is the chief judge and at the time of coronation, the priest advises the King to judge the strong and the weak impartially.[39]

In the Samhitas of Yajurveda the term "sabhapati" (सभापतिः) or

the head of the sabhā is mentioned. The *vājasaneisamhita called as śuklayajurveda* and the *taittirīya brāhmaṇa of Kṛṣṇayajurveda* speak of praśnavivāka *as: One who asks questions.*[40]

This is probably the first account of a judge. The sabhā consisted of brāhmaṇas (ब्राह्मणाः) well versed in *Vedās*. The *Satapatha brāhmaṇa* provides that *King and śrotriya brāhmaṇās are upholders of law.*[41]

It is also further said that the King, though described as the daṇḍadhara or wielder of the rod, aspires for the support of Sabhā and Samiti. *May the Samiti and the Sabhā, the two daughters of prajāpati concurrently aid me.*[42]

The state was governed by King. The King is often referred to as gopa protector and (samrāṭ) supreme ruler. He governed the people with their consent and approval. It is possible that he was sometimes elected through the Sabhā and Samithi. There is a sukta in *Atharvaveda* regarding this:

O King, to thee hath come the kingship; advance with thy splendor. As a leader shine as the sole ruler of the people. King, let denizens of all regions invite thee. Here let men wait on thee and bow before thee! O King, the subjects shall elect thee for the kingship, these five celestial regions will accept thee as their lord. Rest on the height and top of kingly power: thence as a mighty man award us treasures![43]

आ त्वा गन् राष्ट्रं सह वर्चसोदिहि प्राङ् विशां पतिरेकराट् त्वं वि राज।
सर्वास्त्वा राजन् प्रदिशो ह्वयन्तूपसद्यो नमस्योऽभवेह।।

त्वां विशो वृणतां राज्याऽथ त्वामिमाः प्रदिशः पञ्च देवी।
वर्ष्मन् राष्ट्रस्य ककुदि श्रयस्व ततो न उग्रो वि भजा वसूनि।।[43]

ā tvā gan rāṣṭraṃ saha varcasodihi prāṅ viśāṃ patirekarāṭ tvaṃ vi rāja।

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sarvāstvā rājan pradiśo hvayantūpasadyo
namasyo'bhaveha॥

tvāṃ viśo vṛṇatāṃ rājyā'tha tvāmimāḥ
pradiśaḥ pañca devī।
varṣman rāṣṭrasya kakudi śrayasva tato na
ugro vi bhajā vasūni॥

Monarchy was the normal form of Vedic polity, but it was a limited constitutional monarchy. Thus, in those remote days, the autocracy of the Vedic King was limited by democratic checks such as the election and expulsion. Vedic democracy also knew of the vote of majority for which they used "nariṣṭha". Sāyana, in his commentary on Atharvaveda, explains this as the voice of the many.[44]

बहवः सम्भूय यदि एकं वाक्यं वदेयुः तत् हि न परैः अतिलङ्घनीयम्।[44]

"bahavaḥ sambhūya yadi ekaṃ vākyaṃ vadeyuḥ tat hi na paraiḥ atilaṅghanīyam।"

This was exercised by the two popular assemblies sabhā and samithi. The term sabhā is often mentioned in the *ṛgveda.*[45]

भद्रं गृहं कृणुथ भद्रवाचो बृहद् वो वय उच्यते सभासु।
श्वात्रभाजा वयसा सचते सदा चन्द्रो याति सभामुप।[45]

bhadraṃ gṛhaṃ kṛṇutha bhadravāco bṛhad vo vaya
ucyate sabhāsu।
śvātrabhājā vayasā sacate sadā candro yāti sabhāmupa।

It denotes "the people in conclave" and the "hall" which was the venue of their meeting. That it was a gathering of the elect, when it was convened for administrative purposes, is clear from the term Sabheya: *"worthy of the assembly,"*[46]

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सभ्यो विधेयः।[46]

sabhayo vipro ll.

The Samiti in the sense of an "Assembly" is mentioned in the *ṛgveda.*[47]

परि सद्मेव पशुमन्ति होता राजा न सत्यः समितीरियानः।[47]

pari sadmeva paśumanti hotā rājā na satyaḥ samitīriyānaḥ।

The Samiti was a more comprehensive conference including all the common people (viśa). It appears that the samiti was an august assembly of a larger group of the people for the discharge of political business and was presided over by the King. The Sabhā, a more select body, was less popular and political in character than the samiti and actively participated in administration. There are hymns in the samhitās and brāhmaṇas to celebrate not only the coronation of kings, but also the return of exiled kings. This implies that the people had the power to punish kings if an emergency arose, by banishing them. Royal power was gradually consolidating itself, but even a long and unbroken descent could not save a king from the wrath of his subjects. The popular control in the affairs of states was exercised, through the two popular Assemblies, Sabhā and Samiti not only in the general administration but also over the king. This can be inferred from a fervent prayer made by a king requesting that the Samiti and the Sabhā, the two daughters of Prajāpati, aid him.

This passage in The *Atharvaveda* describes the popular Assemblies as issues of the same Prajāpati, from whom the King derives all his power and authority. Thus both monarchy and the popular assemblies are placed on the same level as institutions of divine nature. The King took particular care to be in the good grace of the assemblies and the loss of their favour and support was regarded as a calamity for him:

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In concord may the king's two daughters, the House of Commons and the House of Lords, both protect me. May every member I meet respect and aid me. Fair be my words, o learned persons at your meetings.[48]

सभा च मा समितिश्चावतां प्रजापतेर्दुहितरौ संविदने।
येना संगच्छा उप मा स शिक्षाच्चारु वदानि पितरः संगतेषु।।[48]

sabhā ca mā samitiścāvatāṃ prajāpaterduhitarau saṃvidane।
yenā saṃgacchā upa mā sa śikṣāccāru vadāni pitaraḥ saṃgateṣu।।

"We know by name, O Assembly; thy name is Narishta. Let all the members who join the Assembly agree with me".[49]

विद्म ते सभे नाम नरिष्टा नाम वा असि।
ये ते के च सभासदस्ते मे सन्तु सवाचसः।।[49]

vidma te sabhe nāma nariṣṭā nāma vā asi।
ye te ke ca sabhāsadaste me santu savācasaḥ।।[49]

I take full advantage of the splendor and learning of the members seated here. O God, make me conspicuous in all this gathered assembly.[50]

एषामहं समासीनानां वर्चो विज्ञानमाददे।
अस्याः सर्वस्याः संसदो मामिन्द्र भगिनं कृणु।।[50]

eṣāmahaṃ samāsīnānāṃ varco vijñānamādade।
asyāḥ sarvasyāḥ saṃsado māmindra bhaginaṃ kṛṇu।।

"Whether your thoughts are turned away, or bound or fastened here and there, we draw them hitherward again: let your mind firmly rest on me".[51]

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एद् वो मनः परागतं यद् बद्धमिह वेह वा।
तद् वा आ वर्तयामासि मयि वो रमतां मनः।।[51]

ed vo manaḥ parāgataṃ yad baddhamiha veha vā।
tad vā ā vartayāmāsi mayi vo ramatāṃ manaḥ।।

Sabhā is an "Assembly-hall" which was used for serious political work as well as for debates, and entertainment. The *Maitrayani Saṃhitā* mentions sabhā in the sense of the court house of the village-judge the grāmyavādin. This can be inferred from the use of the terms *sabhā*sad and *sabhā*chara in the sense of "assessor" and "member of the law-court" respectively. Sabhā met more often for the administration of justice than for political discussion. A Sabhā-pati, "lord of the Assembly, " is mentioned in the *Saṃhitās* of the *Yajurveda*, and the *taittirīya brāhmaṇa* speaks of a sabhā-pala (सभापालः) probably in the sense:

"a guardian of Assembly-hall."[52]

The sabhā thus, appears to be an active institution housed in a place where legal rather than political business was more often transacted, and which also served as the venue of social gatherings. In spite of the popular assemblies, the King's power was on the increase. Probably, this was due to the growth of large territorial states and the evolution of an official hierarchy in place of the old nobility by birth. The King's main function was the protection of the state and the people. Normal relation between states appears to be hostility, and the King had necessarily to be a great war-lord, endowed with ample military resources. These requisites of kingly office are reflected in a hymn of the *Atharva Veda:*

"O King! I bring thee here to the Assembly. Stay in our midst as a ruler. Stand steadfast and immovable. Let all thy subjects desire thee. Let not thy kingdom slip away from thy control!; O King, stick to thy seat of royalty, forsake not thy duty, remove immovable like a mountain, stand steadfast in thy state like the sun, and hold the

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kingship in thy grasp; God has firmly established this man as king, through his constant bounty. May God, the Creator of all and the Guardian of the Vedās, amply instruct him."[53]

राज्ञः संवरणम्।

आ त्वाहार्षमन्तरभूर्ध्रुवस्तिष्ठाविचाचलत्।
विशस्त्वा सर्वावाञ्छन्तु मा त्वद् राष्ट्रमधिभ्रशत्।।

इहैवैधि माप च्योष्ठाः पर्वत इवाविचाचलत्।
इन्द्र इवेह ध्रुवस्तिष्ठेह राष्ट्रमु धारय।।

इन्द्र एतमदीधरद् ध्रुवं ध्रुवेण हविषा।
तस्मै सोमो अधि ब्रवदयं च ब्ह्मणस्पतिः।।[53]

rājñaḥ saṃvaraṇam।

ā tvāhārṣamantarabhūrdhṛvastiṣṭhāvicācalat।
viśastvā sarvāvāñchantu mā tvad rāṣṭramadhibhraśat।।

ihaivaidhi māpa cyoṣṭhāḥ parvata ivāvicācalat।
indra iveha dhruvastiṣṭheha rāṣṭramu dhāraya।।

indra etamadīdharad dhruvaṃ dhruveṇa haviṣā।
tasmai somo adhi bravadayaṃ ca bhmaṇaspatiḥ।।[53]

This evolution of kingly power, out of sheer political necessity, made further progress by the enunciation of his divinity. But this extreme theoretical assumption was hardly applicable to real life. The actual instances of expulsion of the king, referred to above, are not in consonance with these canonical statements. Moreover, one fundamental principle which characterizes the political thought of the Hindus is the conception of Dharma or Sacred Law which sustains the universe and to which both the king and all sections of the community owe obedience. It was the clearly recognized duty of the king to abide by, and give effect to it. The moral and

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spiritual sanctions behind this sacred law were a sufficiently powerful motive for restraining the willful exercise of authority by the king. The *bṛhadāraṇyaka upaniṣad,* clearly enunciates this great principle by saying *that:*

Law is the king of kings, nothing is superior to law, the law aided by the power of the king enables the weak to prevail over the strong[22]

तदेतत् क्षत्रस्य क्षत्रं यद्धर्मः।
तस्माद्धर्मात्परं नास्ति।
अथो अबलीयान् बलीयांसमाशंसते धर्मेण।
यथा राज्ञा एवम्।।[22]

tadetat kṣatrasya kṣatraṃ yaddharmaḥ।
tasmāddharmātparaṃ nāsti।
atho abalīyān balīyāṃsamāśaṃsate dharmeṇa।
yathā rājñā evam।।[22]

Commenting on the above provision, Dr. S. Radhakrishnan in his book 'Principal upaniṣads' observes:

"Even kings are subordinate to Dharma, to the Rule of law"[23]

Both these Assemblies Sabhā and Samiti exercised considerable authority and must have acted as healthy checks on the power of the King. The tradition of popular assembly is continuing successfully till date and India is proud of its great democratic and traditional values. Great importance was attached, not only to concord between the King and the Assembly, but also to a spirit of harmony among the members of the Assembly.

Vedic society: The (grāma) village, viś and jana were political units of the early Vedic period. A vis was probably a subdivision of a jana and a grama was probably a smaller unit than the other two. The leader of a grāma was called grāmani and that of a vis was called viś pati. Another unit was the gaṇa whose head was

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a (jyeṣṭa) elder. Some of the hymns of *ṛgveda* throw light on the life style and conduct of the people obtaining in those remotest times. Usually customs and usages emerge from the behavior of people involved in the activities of various sections in a society. Such customs or usages contribute largely for the formation of an identifiable segment of society aiming at the wellbeing of the people. To understand the evolution of those customs into some rules or controls, binding on the people uniformly as laws and the procedure to ensure the proper adoption of such rules, it is necessary to examine the structure of the society and the relative social organizations working in those times of ancient India. These usages or customs over a period of time undergo some change to suit the developing needs of the society. The smṛtis do not give us the earliest stage of the society. As a matter of fact, the smṛti epoch implies fairly advanced society with considerable improvements and diverse ways. We have many references in Sutra literature about the earlier stages of the Hindu Society. Dr.U.C. Sarkar says in his *'Legal Research Essays'* that :

No society or people begin with some ready-made customs or practices, far less any written or codified law. This is generally true of more or less every system of law. Hindu Law was also not an exception. So even prior to the society of the smṛti era there were other stages of the society, in which customs and practices were growing gradually and imperceptibly to be crystallized only after a considerable length of time. In this sense, *it is substantially correct to say that Hindu Law was essentially based on customs and usages of the population.*[54]

Kumkum Roy in his book *Ancient India* describes vividly the social context obtaining at that time as under:

The basic social unit was probably the patriarchal family. Larger units included the vish, which may mean a clan or the entire tribe. Its importance is evident from the fact that it is mentioned several times in the ṛgveda. Another unit, the jana is also frequently referred to. The

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exact relationship between the jana and the vish is ambiguous. But the occasional references would suggest that jana included a number of vish. Both the terms are used to indicate the totality of society. It is likely that the jana wandered, as a unit, in search of pasture. With the development of settled agriculture, janas were gradually converted into janapadas or territorial units. These janapadas were frequently named after the dominant kṣatriya lineages eg., the Kuru-Panchala janapada'...'Related to this element of popular participation, the existence of a number of popular assemblies constituted a distinctive feature of early Vedic polity. Such assemblies include the Vidatha, the Sabhā and the Samiti. The Vidatha was an assembly in which both men and women participated. Such assemblies functioned as centers for settling disputes.'..... 'While the Vidatha seems to have been the most important assembly during the early Vedic period, its place was gradually taken by the sabhā and the Samiti. The sabhā was probably a more exclusive body, with membership restricted to the elite, whereas the Samiti was more in the nature of a folk assembly in which the entire population could participate.' ....'Broadly, we see the beginnings of the emergence of the territorial state or the janapada, ruled by the raja'[55]

It appears that there were small village units with a village head known as 'Grāminī' (ग्रामिन्) as referred to in *ṛgveda* and the village is referred to as a small unit where people live. At some places village-society is mentioned; and 'Grāminī' is referred to as leader of the village.[56]

निग्रामासु अविक्षतः।. गव्यन्ग्राम इषित इन्द्रजूतः; . सहस्रदा ग्रामणीः।[56]

nigrāmāsu avikṣataḥ।. gavyangrāma iṣita indrajūtaḥ; sahasradā grāmaṇīḥ.

In *taithiriya brāhmaṇa* where boundary between the two villages is mentioned.[57]

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विदूरं ग्रामयोर्ग्रामान्तौ स्यातम्।[57]

vidūraṃ grāmayorgrāmāntau syātām.

Over a period of time these villages grew in size and formed into larger territories, constituting as different tribes known as Anu, Druhyu, Turvasu, Kuru, pāñcālās etc., which were referred to in *ṛgveda* and Upaniṣads. Each tribe was governed by a king whose duty was to keep order and ensure the safety of that tribe.

According to Hindu jurisprudence the law aided by the power of the king enables the weak to prevail over the strong. The law, according to western jurisprudence, as mentioned in *'Salmond Jurisprudence'* is an imperative command which is enforced by some superior power or sovereign:

'The superior power which serves as an instrument of coercion for the enforcement of law is called the sanction.'[58]

It may be observed that there is a distinguished difference between the concept of law as defined in western jurisprudence and Hindu jurisprudence. The imperative command of the King constituted the law according to the western jurisprudence whereas the law was a command even to the King and was recognized as superior to the King.

The principle laid down was that in case of conflict between the Smṛtis and the Shrutis the latter would prevail. It means the Smṛtis could supplement the Shruti but not supplant it. P.V. Kane says that:

In these cases the proposition enunciated by Jaimini is that 'in case of conflict (between an express śruti rule and a smruti rule) the smṛti rule should be discarded, for when there is no conflict (with an express śruti) inference may be made (that a smruti rule is based upon some Vedic text)[59]

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It is in this way the Vedās formed the basic law. But from the practical point of legal history, the relevant parts of Dharmasūtrās and Arthaśāstra are the real legal literature comparable to modern civil and criminal laws. A.S. Atlekar in his treatise *'State and Government in Ancient India'* obsersves that:

The Dharmasūtrās *and the Arthaśāstra reveal to us a more or less full fledged and well developed judiciary. The King was at its head and he was to attend the court daily to decide disputes..... The* Dharmasūtrās *and Nītiśāstra literature regards the King as the fountain source of all justice.* [60]

Sūtrā period: The earlier works which laid down the law in the form of sūtrās were divided into three classes: i) śrautasūtrās, which regulated the rituals; ii) Gṛhyasūtrās, which regulated matters relating to family life; and iii) Dharmasūtrās dealing with civil and criminal law.

The śrauta and Gṛhyasūtrās regulated religious rituals and personal code of conduct at different stages of life. The principal Srauta sūtrās were authored by āpastamba, āśvalāyana, Baudhāyana, kātyāyana and some of the gṛhyasūtrās were authored by āpastamba, and āśvalāyana. Kane in his treatise *History of Dharmaśāstra* mentions that:

These śrauta and gṛhyasūtrās may be related to a period 800 B.C—400 B.C. [61]

These sūtrās coming next to Vedās contain rules relating to the rituals to be followed at every stage of human life from birth to death. They deal very minutely the procedure attached to every stage including the verses of Veda. These sūtrās give detailed life picture of the people of remote times. The duties and responsibilities they follow indirectly indicate the basis for the future enactments.

Dharmasūtrās coming after śrauta and gṛhyasūtrās occupy an important place in the legal history of Ancient India. These constitute

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a first written code providing a base for the future enactments. It can easily be inferred that in course of time the customs and traditions were studied by the scholars of the community and they were shaped into definite principles and were later taken in the manuals of law. These manuals became the Dharmasūtrās of the particular schools. These are authored by Gautama, āpastamba, bauddhāyan, vāśiṣṭa and few others. P.V.Kane says that *these relate to the period 600 BC. -300 BC*[62]

Dharmasūtrās also lay down detailed rules of conduct at four stages of Asramas ie., Brahmacharya, gaṛhasta, vānaprastha, and sanyāsa. Brahmacharya covers the period of study. After completion of studies one acquires the status of Grihastha by getting married and enters into gṛhastāśrama. Then, after completion of family responsibilities he entrusts the household management to the other coparceners and enters into vānaprastha where he prepares himself to join the fourth stage of Sanyasa to seriously engage himself for achieving self realization.

Besides the set of duties for all, at every stage of life, the Dharmasūtrās also stipulate the duties and responsibilities of the King. They provide the detailed rules for the King to administer justice by conducting the vyavahāra (व्यवहारः) and to impose punishments. Thus the Dharmasūtrās assume great importance on account of framing a detailed legal procedure for the first time to enable the king to administer justice systematically and to impose punishment on offenders as prescribed in *Gauthama Dharmasūtrās*:

His administration of justice shall be regulated by the Veda, the Institutes of the Sacred Law, the Angas, and the Purana. The law of countries, castes, and families, which are not opposed to the (sacred) records, have also authority. Cultivators, traders, herdsmen, money-lenders, and artisans have authority to lay down rules for their respective classes. Having learned the state of affairs from those who

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in each class have authority to speak he shall give the legal decision. If the evidence is conflicting, he shall learn the truth from brāhmaṇas who are well versed in the threefold sacred lore, and give his decision accordingly. [63]

It can also be observed that the social context obtaining at that time indicates that all the disputes could not be examined by the King. Only those which have considerable public importance in relation to dharma used to be brought to the notice of the King. At village level the community head or gild of elders who assumed the authority by virtue of respect they earned in that particular section of society used to handle the disputes and impose punishments.

Whereas, the upper class people used to follow different śākhās/schools or charanas of Vedic Samhitās. They were in the purview of a group of persons who were well versed in sacred laws. Such bodies known by name pariṣads were operating in ancient times. Doubts and disputes relating to theology were used to be referred to these pariṣads. In the *Bṛhadāraṇyaka upaniṣad* a reference is made to the pariṣad of the *pāñcālās* to whom Svetaketu went for learning after finishing his education... [64]

स्वेतकेतुर्ह वा आरुणेयःपञ्चालानां परिषदमाजगाम.. [64]

svetaketurha vā āruṇeyaḥpañcālānāṃ
pariṣadamājagāma...

It would thus seem that these pariṣads of learned men had authority from the earliest times in matters involving the sacred law. In all these developments, however, these dharma sūtrās are only manuals of certain schools or charnas and are practical authorities only among the followers of the respective schools. It seems that their application was limited to some pockets of territory and that too to certain class of people belonging to a particular school whereas at certain village levels community guilds or grāminī used to apply local customs and usages in solving disputes. Over a

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period of time a need arose to consolidate the contents of various Dharmasūtrās and traditions or customs, then existing to cover all the people uniformly for their common application. Thus Dharmaśāstrās known by name Smṛtis came into existence with encyclopaedic character. Around that period, *Viṣṇu* Dharmasūtrās came into existence contributing further development of law. P.V. Kane observes that *they relate to a period 100 A.D—300 A.D.*[65]

In the order of evolution of laws Kautilya's *Arthaśāstra* can be placed subsequent to the Dharmasūtrās. Kautilya's *Arthaśāstra* attributed to belong to that time, has provided a comprehensive set of laws covering every aspect of a state including administrative, legislative and judicial areas and carved its place a watershed in the history of ancient political legislative and administrative systems. P.V. Kane says that *it relates to 300 B.C—100 A.D.*[66]

Smṛti period: Over a period, people moved to different places due to increase in population. The Vedic culture appears to have provided a common base line to various sections of the ancient society. It is observed that on account of this, synthesis of various facets of culture connected the different sections of society.

As observed earlier, the customs and usages of different sections of society played a great role in the development of law in Ancient India. It was also possible that the development of vast kingdoms and empires might have forced the need for a common code to properly govern the entire community. The institution of King got strengthened over a period, expanding its judicial purview. In any case, we find that the smṛti literature contributed for a substantial development in the evolution of law in Ancient Bhārat. On account of such marked development and owing to the encyclopaedic nature of Smṛti literature, the different procedures obtaining between sakhas, charnas and in certain sections of societies stand modified to form a uniform code of rules applicable to all. Drawing the contents from out of the source of Veda,

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numbers of smṛtis were compiled by the intellectuals keeping in view the various needs of several people. In the *Tantravarthika* as mentioned in *Studies of Hindu Law,* it is stated that:

As the population increase and spread to different places with varied needs which prompted the wise men to compile number of Smṛtis to suit the needs of several people drawing the contents from out of the source of Veda. This may be one of the reasons for the view held by later writers that all Smṛtis are equally and universally binding. [67]

Smṛtis mark the second stage in the evolution of Hindu law. It is marked by elaborate and comprehensive codes in which the aphoristic style of the sūtrās is replaced by a metrical form. Owing to its mnemonic value metrical form appears to have been preferred. The whole series of the texts from the sūtra works down to the metrical works are comprehensively known by the name of smṛti. The growth of these Dharmaśāstrās of universal authority marks an important stage in the development of Hindu society. There has apparently been, before this, a great inter-mixture and consolidation of the different communities belonging to the different schools and also a development of a synthetic common culture among persons professing the laws in the various schools.

After the Dharmasūtrās and *Arthaśāstra* the next and the most important and authoritative source of Hindu legal literature is found in the smṛtis. The compilation of the smṛtis resembles the modern method of codification. All the legal principles here and there scattered in the vedās and also those included in the Dharma sūtrās as well as the custom or usage which came to be practised and accepted by the society, were collected together and arranged subject wise in a systematic manner. The smṛtis also dwelt with the constitution and gradation of courts, appointment of judges, their qualifications as also the procedural law for the enforcement of substantive law. They disclose a well developed legal and judicial system. The important smṛtis are: *Manusmṛti, Yājñavalkyasmṛti, nāradasmṛti, Parāśarasmṛti, Bṛhaspatismṛti, Kātyāyanasmṛti.*

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These works mark the last stage of ancient Indian law with which this treatise is directly concerned. These codes however were not entirely new. It may be observed that the *manusaṃhitā* contains many texts which are cited either verbatim or in substance in the sūtrā manuals that preceded it. Some contents of Vedic texts also are reproduced. *manusaṃhitā* is a compilation of all known texts from the most ancient times. By tradition, from Vedic times, Manu was known as the first law-giver of the human race. It was a great attempt to consolidate and crystallize a complete code of laws on the basis of known and then existing texts, usages and customs from different sources. Thereafter many smṛtis reported to have come into existence over a long period. Though they are not available in full but their existence in the past is inferred from the relative quotations or references appearing in subsequent works. For example sixteen authors were named by Yājñavalkya. Paithinasi cited in *smṛticandrika* as many as thirty six names.

Of the metrical smṛtis comparatively few are available now in full. The existence of such number of smṛtis in the past can be attributed to the need to modify and reconstruct the ancient law by adapting to the changing requirements of the growing society over a long period. As these smṛtis emanated from human authors there appears to be a need for confirmation of their trustworthy character. They accepted their authoritative character only when they were convinced that they are in conformity with those contained in the Veda and nothing new was added. With this belief in mind that wherever they could not trace the relative reference from Veda they got convinced that the relative portion of Veda must have lost in long duration of time. As regards the exact number of smṛtis there is no unanimity of opinion. The number of smṛtis available is known in part or full, up till now, are set out in Kane's *History of Dharmaśāstra (Vol. I, pages 135-246)*. Metrical smṛtis must have continued up to around eighth century as thereafter we find the period of legal texts commenced commenting on these smṛtis.

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Legal Texts: Importance of the legal texts lies in their contribution to the growth of law. From eighth century onwards there appears to be a significant development of law on account of commentaries written by eminent writers. P.V. Kane observes in his *History of Dharmaśāstra* that:

Viśvarūpa is placed in between 800-850 A.D. who wrote first commentary on Yājñavalkyasmṛti. [68]

By that time, owing to the progressive changes in the society certain usages and customs being accepted by all came into conflict with the age old procedural laws prescribed in smṛti literature. Smṛti literature became the base for the writers as it had already consolidated and codified the principles of dharma from Vedic literature of religious texts. On account of verse form of smṛti literature it was little difficult to understand by the ordinary people. It was for the eminent jurists to further explain the rationale of the laws in smṛtis and also to modify some of them to suit to the changes that took place over a period of time. They took the help of mīmāṃsa in interpreting the provisions of smṛti texts.

Several eminent jurists wrote commentaries on the smṛtis during their respective times and made the smṛti laws practical, understandable and workable. By the process of intellectual interpretation, the prevalent customs in the society were dovetailed into legal frame and met the growing needs of the developing society. The very principle propounded in smṛtis that custom, usage and good conduct would form a source of law had come to their rescue in dealing with the smṛti literature. In the course of interpreting the laws, the commentators reconciled the conflicting principles, and gave a rational interpretation removing the procedures which had become obsolete and even modified and supplemented the rules of the smṛtis.

But during the period of Legal texts we find the writers laying far greater stress in the smṛtis than upon the śruti. This

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might have been due to the simple reason that the smṛti texts were easier to comprehend and modify than the śruti texts. Still later, contemporary custom attained the prime position, to be regarded as even more authoritative than anything else. It is stated in *smṛticandrika* that:

The custom of a country should receive the first consideration; and in every country its Custom alone should be observed.[69]

देशाचारस्तावदादौ विचिन्त्यो।
यस्मिन् देशे या स्थितिः सैव कार्या ।[69]

deśācārastāvadādau vicintyo।
yasmin deśe yā śthitiḥ saiva kāryā ।

All this, points to the fact that in the field of Law, there has all along been a progressive spirit at work conforming to the changes that are taking place in the society. Recognizing this fact, it is observed in *Parāśarasmṛti* that:

The dharmas for men in the Satyayuga are other than those in the Treta and Dvapara and in the Kaliyuga also they are different—the dharma of each Yuga being in keeping with the distinctive character of that age.[70]

तपः परं क्रुतयुगे त्रेतायां ज्ञानमुच्यते।।
द्वापरे यज्ञमेवाहुः दानमेव कलियुगे।
क्रुतेतु मानवाधर्माः त्रेतायां गौतमाः स्मृताः। 24-1

द्वापरे शन्खलिखिताः कलौ पाराशराः स्मृताः।।[70] *25-1*

tapaḥ paraṃ krutayuge tretāyāṃ
jñānamucyate।। PS, 1-23,

dvāpare yajñamevāhuḥ dānameva kaliyuge।

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krutetu mānavādharmāḥ tretāyāṃ

gautamāḥ smṛtāḥ। 1-24

dvāpare śankhalikhitāḥ kalau pārāśarāḥ smṛtāḥ।। 1-25 [70]

The same declaration is found in *Manusmṛti* with an important variation that instead of saying that' the dharma of each Yuga is in keeping with the distinctive character of that age, ' he says:

'The difference in dharma is due to the gradual decay occurred in the character of the people of each age.'[71]

अन्ये कृतयुगे धर्मास्त्रेतायां द्वापरेऽपरे।
अन्ये कलियुगे न्रूणां युगह्रासानुरूपतः।।

तपः परं कृतयुगे त्रेतायां ज्ञानमुच्यते।
द्वापरे यज्ञमेवाहुर्दानमेकं कलौ युगे।। [71]

anye kṛtayuge dharmāstretāyāṃ dvāpare'pare।

anye kaliyuge nrūṇāṃ yugahrāsānurūpataḥ।।

tapaḥ paraṃ kṛtayuge tretāyāṃ jñānamucyate।

dvāpare yajñamevāhurdānamekaṃ kalau yuge।।

A similar explanation is given in *Vīramitrodayaparibhāṣa* about P*arāśara*'s declaration that:

the dharmas for the Satyayuga are those prescribed by Manu; for the Treta those by Gautama; for the Dvapara those by Sankha and Likhita; and for the Kali those by Parasara.[72] This view was also earlier stated by B*audhāyana* vide *The Sacred Books Of The East, Volume14 (Vāśiṣṭa &Boudhayana).*

One should perform the necessary duties, so far as he is capable of doing[73]

This actual adaptation of the Law to changing conditions moved on effectively so long as there was present in the country

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a temporal authority sufficiently interested and strong enough to lend to the changes its support and thereby supply the necessary driving force. While there are numerous nibandhāḥ, commentaries and digests some of the important ones which have been accepted and followed by the society and enforced by the courts in the past and even in recent years are discussed in a separate chapter following the smṛti period.

Human Rights: History of Human Rights as an important segment in International law is of recent origin. Up to the end of the 18th century, the Governments throughout the world adopted 'Police State'. Under this policy, it may be observed, that the State could not give due importance to the welfare activities in the society. Industrial revolution of 18th century brought slavery along with imperialism. The concept of Human Rights spread throughout the world only with the founding of United Nations Organization in the year 1945. Article 55 of the Charter of UNO narrates its objects about 'Human Rights' as follows:

With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations, based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace. [74]

The outcome of the world war second must have caused the realization throughout the world to think about a welfare state. Whereas in ancient Bhārat the Human Rights were recognized from times immemorial. *ṛgveda* which is regarded as the oldest document declares that:

All human beings are equal and they are brothers. [75]

सङ्गच्छध्वं सं वदध्वं सं वो मनांसि जानताम्।
समानो मन्त्रः समितिः समानी समानं मनः सह चित्तमेषाम्।

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समानी व आकूतिः समान हृदयानि वः।

समानमस्तु वो मनो यथा वः सुसहासति।।[75]

saṅagchadhvaṃ saṃ vadadhvaṃ saṃ vo manāṃsi jānatām।

samāno mantraḥ samitiḥ samānī samānaṃ manaḥ saha cittameṣām।

samānī va ākūtiḥ samāna hṛdayāni vaḥ।samānamastu vo mano yathā vaḥ susahāsati।।[75]

The *Atharvana Veda* declared that:

All human beings have equal right over natural resources. [76]

समानी प्रपा सह वोन्नभागः।

समाने योक्त्रे सह वो यनज्मि।

आराः नाभिमिवाभितः।।[76]

samānī prapā saha vonnabhāgaḥ। samāne yoktre saha vo yanajmi।

ārāḥ nābhimivābhitaḥ।।

The concept of Dharma propounded in Veda is an epitome of all Human Rights. Following strictly the principles of Dharma in one's life is nothing but living in a welfare state. This aspect is pointed out by the Hnoroble Supreme Court of India in their judgment, Meneka Gandhi Vs Union of Inida:

"These fundamental rights represent the basic values cherished by the people of this Country since the Vedic times and they are calculated to protect the dignity of the individual and create conditions in which every human being can develop his personality to the fullest extent."[77]

Thus the teaching of the ancient Hindu society was self-sacrifice for others-for the rest of the society. The administration of the ancient Indian society was thus based on social welfare.

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A careful study of the legal literature referred to above discloses that the system of jurisprudence was well developed in ancient India. Having regard to the dates when these books were written, it is generally agreed that Hindu jurisprudence is the most ancient system of jurisprudence. Some of the legal principles propounded in the hoary past by the Hindu jurists reveal their outstanding contribution made to the development of law. Several of the principles propounded by them are of eternal value and many of those principles are found incorporated in one form or other in the various laws enacted by modern legislatures. Therefore the study of law evolved by our ancient jurists provides not only the knowledge of the system, but also inspiration and guidance for making further contribution to this ever-growing branch of human knowledge. Having traced the important stages of evolution of law from the Vedic period, the details of the substantive and procedural aspects of law will be dealt, beginning with the Dharmasūtrās in the next chapter.

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Chapter - III

Judicial prescriptions in Dharmasūtrās

Dharmasūtrās deal with the law. They are generally in prose, occasionally containing verses which are often in the form of quotations. They contain some of the legal doctrines. Among the Dharmasūtrās those compiled by Gautama, āpastamba , vaśiṣṭa, Baudhāyana, Harita and Viṣṇu are important and regarded as the earliest works. They constitute the foundation of Hindu legal system. It is accepted that *ṛgveda* is the earliest treatise in the world and the other samhitas came later. The Brāhmaṇās, āraṇyakas, Upaniṣads as a class generally speaking, followed one another in this order. The Srauta and gṛhyasūtrās came next and then the Dharmasūtrās of each school. According to Max Muller vide *The Sacred Books Of The East, Volume (apastamba & Gautama).*

These sūtras must be considered as belonging to the Vedik period of literature..... They form indeed the last branch of Vedic lierature.[1]

Some rules of positive law scattered here and there and the customs and usages obtaining at that time were collected and formulated into aphorisms and compiled these manuals which can be treated as first written law. Among the extant Dharmasūtrās, it seems that the *Gautama Dharmasūtrās* are the oldest. Apastamba, Baudhayana, V*āśiṣṭa* and others followed. According to P.V. Kane vide History of Dharmaśāstra, Volume III.

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They belong to 600 B.C-300 BC. Among the other sūtra work vyavahāra *came around 100AD-300AD provides us with the law in its most developed form. It is very close to the later metrical* smṛtis *like Manu and yājñavalkya.*[2]

The aphorisms in respect of judicial system were segregated and dealt under the separate topics of vyavahāra. Thus they acquired legal character. The subjects dealt under vyavahāra continued to grow from the time of Gautama and became an elaborate code in the vyavahāra Visnusmṛti which is known as last in the *sūtra* literature. According to Max Muller vide *The Sacred Books Of The East, Volume (*āpastamba *& Gautama).*

They continued to remain as a subsidiary source of law under the presumption that their origin being from the revealed law.[3]

वेदाश्च। वेदा एव मूलप्रमाणं धर्माधर्मयोः।[3]

vedāśca। vedā eva mūlapramāṇaṃ dharmādharmayoḥ।[3]

In all these developments however these *sūtras* are only manuals of certain schools or charanas. Their application, it appears, mainly limited to some orthodox brāhmins who were covered by various śākhās and charanas of samhitās. Thus their applicability was limited to certain schools. It seems that many texts of Dharmasūtrās are lost. But abundant quotations of those texts are found in various legal texts. Between the Vedic period and the period of Dharmasūtrās there appear to be a huge time gap. Behind these aphorisms, as formulated in the sutra texts, there must have been a long history of the development of the customs. It is very difficult to trace closely as to how a custom or usage has progressed to acquire the status of a rule and got incorporated in the manuals of Dharmasūtrās.

Among the Dharmasūtrās, the *'Gautama Dharmasūtrās'* are considered to be the oldest. The work is in prose form. Gautama deals with legal and religious matters extensively. With regard to the

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role of the King, and the judicial procedure to follow in providing justice to the aggrieved, Gautama's observations appear to have formed a substantial base for many developments in the field of administration of justice. It is surprising to note the substantial progress in judicial system achieved by the time of sutra period in ancient Bhārat. Gautama lays down that vide *The Sacred Books Of The East, Volume (apastamba& Gautama).*

In administering justice the king has to get his law from three sources: i) The scriptures, including the Veda, Dharmasūtrās, Vedāṃgās and Purana; Customs and usages of countries, communities and Kulas not opposed to sacred texts; ii) Customs and laws prevailing among cultivators, traders, herdsmen, money lenders and artisans determined by each community in matters relating to themselves. He further says that in respect of each of these different heads, the king must ascertain the law from those who have authority to lay down rules for their respective classes. iii) In case of vipratipati, i.e. doubt or difficulty, the king has to ascertain the law from brāhmaṇas who are well versed in the threefold sacred lore. and give his decision accordingly.[4]

तस्य च व्यवहारो वेदो धर्मशास्त्राणि अङ्गानि उपवेदाः प्रमाणम्।
कर्षक वणिक् पशुपाल कुसीदिकारवः स्वे स्वे वर्गे।

तेभ्यो यथाधिकारमर्थान् प्रत्थव हृत्थधर्मव्यवस्थ।
विप्रतिपत्तौ त्रैविद्या वृद्धेभ्यःप्रत्यवक्तृत्य निष्टां गमयेत्।[4]

tasya ca vyavahāro vedo dharmaśāstrāṇi aṅgāni upavedāḥ pramāṇam।
karṣaka vaṇik paśupāla kusīdikāravaḥ sve sve varge।

tebhyo yathādhikāramarthān pratthava hṛtthadharmavyavastha।
vipratipattau traividyā vṛddhebhyaḥpratyavaktṛtya niṣṭāṃ gamayet।[4]

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Thus he is required to ascertain law from several competen sources before taking a decision. It shows how the institutio of 'Kingship' is strengthened to enable the king to exercise hi authority in the matter of administration of justice according to th principles of dharma. These texts no doubt facilitate the King t perform his role as judge in providing justice to the aggrieved an punish the guilty. Gautama says:

A King and a brāhmaṇa, both are supposed to have deep knowl edge in sacred texts as they have to uphold the moral order in th world.[5]

It is stated in *Gautama Dharmasūtrās* that:

It is King's responsibility to protect all created beings. And he has to inflict lawful punishments as and when necessary to protect all created beings is the additional (occupation) of a King. And to inflict lawful punishments.[6]

About his characteristic features as head of judicial administration he says that:

King shall be truthful in his actions and speech; possess deep knowledge in three Vedās and logic. He shall be pure with subdued senses. He shall be impartial towards his subjects and always aim at their wellbeing. He shall protect them in accordance with the justice.[7]

He shall be holy in acts and speech. And he shall do what is good for them. He shall protect the castes and orders in accordance with justice.. And he shall select as his domestic priest (purohita) a brāhmaṇa who is learned in the Vedās, *of noble family, eloquent, handsome, of a suitable age, and of a virtuous disposition, who lives righteously and who is austere. For it is declared in the Veda: "kṣatriyas, who are assisted by brāhmaṇas, prosper and do not fall into distress." His administration of justice shall be regulated by the Veda, the Institutes of the Sacred Law, the Angas, and the Purana.*[8]

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Gautama Dharmasūtrās, 20, 21, 23, 25 and 32 of chapter XI stipulate that the existing customs and traditions followed in the families of all the castes at different places which are not opposed to the sacred texts have also authority. This is how law is allowed to take into consideration the changes that are taking place in the contemporary society which in fact has contributed for the rapid progress in law in ancient Bhārat. In addition to this, he has also provided liberty to the cultivators, traders, herdsmen, money-lenders, and artisans to lay down rules for their respective classes. Having learned the state of affairs from those who in each class have authority to speak he shall give the legal decision. He stresses that reasoning is a means for arriving at the truth and the King's decisions shall be based on it. In the event of conflicting situations he should consult his spiritual teacher. Therefore it is also suggested that he should maintain good relations with his purohit. (spiritual teacher)

The laws of countries, castes, and families, which are not opposed to the (sacred) records, have also authority.(20) Cultivators, traders, herdsmen, money-lenders, and artisans have authority to lay down rules for their respective classes.(21) Reasoning is a means for arriving at the truth.(23) If the evidence is conflicting, he shall learn the truth from brāhmaṇas who are well versed in the threefold sacred lore, and give his decision accordingly(25). A king and a spiritual teacher must not be in rivalry.(32)[9]

With regard to imposition of punishment he says that it must be regulated to ensure that it must be proportionate to the offence committed. Dharmasūtra 51 of the XII chapter says that;

The award of the punishment must be regulated by a consideration of the status of the criminal of his bodily strength, of the nature of the crime, and whether the offence has been repeated.[10]

In fact, the concept of proportionate punishment has already taken shape by the sūtrā period. This compares well with section

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53 of IPC which deals with various punishments right fro
fine to death.

Gautama's observations on the subject of witness are wort
emulating. Dharmasūtras 1, 5- 9, 12, 23 - 25, and 31 of Chapter XI
stipulate as under:

In disputed cases the truth shall be established by means o witnesses. Witnesses shall not speak singly or without being asked. O being asked if they do not answer they are guilty of crime. Heave is their reward, if they speak the truth; in the contrary case hell wi be their portion. Persons not mentioned in the plaint, must also giv evidence. No objection can be raised against witnesses in a case o criminal hurt. Some declare, that the witnesses shall be charged o oath to speak the truth. A witness must be reprimanded and punished for speaking an untruth. No guilt is incurred by giving false evidence, in case the life of a man depends thereon. But this rule does not hold good if the life of a very wicked man depends on the evidence of a witness. To speak the truth before the judge is more important than all other duties[11]

According to Dr. Bulher, āpastamba, a native of āndhra area in South India, probably flourished in third century before Christ. This work exhibits great merit and regarded as of high authority. This Dharmasūtra is mostly quoted and referred to by subsequent law writers. *Ujjvala* is a commentary on this Dharmasūtra by the well known commentator Hardatta. Dr. Bulher says:

The āpastambhīya dharmasūtra forms part of an enormous Kalpa-sūtra or body of aphorisms, which digests the teaching of the Veda and of the ancient ṛṣis.[12]

About the institution of King it is mentioned that for the convenience of administration:

He (King) shall appoint men who are pure and truthful, over villages and towns for the protection of the people. (Prasna II, Patala 10, Khanda 26-4) They must protect a town from thieves in

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every direction to the distance of one yojana. (Prasna II, Patala 10, Khanda 26-6) They must be made to repay what is stolen within these boundaries. (Prasna II, Patala 10, Khanda 26-8) The king shall make them collect the lawful taxes.[13]

With regard to punishment it is said that: *if the king does not punish a punishable offence, the guilt falls upon him.*[14]

He further elaborates that: *He who instigates to, he who assists in and he who commits an act; these three share its rewards in heaven and its punishments in hell.*[15]

IPC Section 107 also expresses the same view with regard to the liability of an abettor. It says that the abetment of the Illegal omission of an act may amount to an offence although the abettor may not himself be bound to do that act.

With regard to the appointment of Judges he says that:

Men of learning and pure descent, who are aged, clever in reasoning and careful in fulfilling the duties of their caste and order, shall be the judges in law-suits. In doubtful cases they shall give their decision after having ascertained the truth by inference, ordeals and the like means. [16]

Vāśiṣṭa Dharmasūtrās attach great importance to the custom and usage and recognizes them: *As supplement to law.*[17.]

Vāśiṣṭa has dealt with various topics of law, such as marriage, adoption and inheritance. Unlike āpastamba, Vāśiṣṭa recognized the system of adoption. He declared that: *It was legitimate to procure a son through adoption.*

For this purpose, he recognized the right of natural father and mother to give his son in adoption. At the same time he also says that: *Let him not give or receive, in adoption, an only son.*[18]

He did not agree with āpastamba which was giving of a son in adoption by one and acceptance by another would amount to selling and buying of a child.

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With regard to the institution of king Vaśiṣṭa says that:

It is the primary duty of the King to protect all beings. He sha have a domestic priest to assist him. Taking into consideration a the laws of countries, subdivisions of castes and families King has t make all the four castes fulfill their respective particular duties. Kin has to punish those who transgress the law and the punishment shoul be proportionate to the gravity of the offence. Punishment must b awarded in cases of assault and abuse after due consideration of th particular place and time where and when the offence was committed, of the duties, age, learning of the parties, and the seat of the injury. I shall be in accordance with the precepts of the sacred records and with precedents.[19]

With regard to his role as judge he says: *He shall follow the legal rules strictly and transact the business on the bench and let him not be partial to one of them when two parties have a dispute. He has to bank upon reason as means to gauze the offence and arrive at the decision.*[20]

Vāśiṣṭa in his 16th chapter refers to documents, witnesses and possession as three kinds of proof and apparently lays down that:

In case of immovable property and boundary disputes, documents are the primary modes of proof. If conflicting documents are produced, reliance may be placed on the statements of aged inhabitants of the village or town, and on those of guilds and corporations of artisans or traders.[21.]

With regard to witness he says that: śrotriyas, *men of unblemished form, of good character, men who are holy and love truth are fit to be witnesses. Men of any caste may give evidence regarding men of any other caste. Women witnesses may be taken in respect of women.*[22.]

Baudhāyana dharmasūtras are in many respects analogous to that of the institutes of the Sacred Law, current in the schools

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of Apastamba and Hiranyakesin. In Prasna I, Adhyaya I, and Kandika I Baudhāyana deals with the sources of the sacred law. It is mentioned that:

The Veda is the first, then the smṛti as second and the practices of śiṣṭās as third source. śiṣṭās are those who are free from envy, free from pride, contented with a store of grain sufficient for ten days, free from covetousness, and free from hypocrisy, arrogance, greed, perplexity, and anger. Those are śiṣṭās who, in accordance with the sacred law, have studied the Veda together with its appendages, know how to draw inferences from that, and are able to adduce proofs perceptible by the senses from the revealed texts. On failure of them, an assembly consisting at least ten members shall decide disputed points of law. There may be five, or there may be three, or there may be one blameless man, who decides questions regarding the sacred law but a thousand fools cannot do it.[23]

He further says that it is very difficult to analyze the complicated sacred law. Hence, if there is a doubt, it must not be propounded by one man only, however learned he may be. He also deals with the importance of proportionate punishment. He observes that:

A person well versed in the sacred law shall fix the penances with discernment, taking into consideration the constitution, the strength, the knowledge, and the age of the offender, as well as the time and the deed. Many thousands of brāhmaṇas cannot form a legal assembly for declaring the sacred law, if they have not fulfilled their sacred duties and not acquainted with the Veda.[24]

***Viṣṇu Dharmasūtrās*:** The major portion of this work is in prose form and the concluding portions are in the form of metrical verses. He deals with various topics of civil law, such as marriage, inheritance, debts, treasure trove etc., as also criminal law. *Vijayani* is commentary on *Viṣṇu Dharmasūtrās* by the well known writer Nanda Pandita.

He deals elaborately on witnesses:

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King, learned brāhmaṇas, a child, a perpetrator of violence, old people of above eighty, person tormented by hunger, one who is oppressed by some sudden calamity and the one wholly absorbed in evil passions cannot be made witnesses. One man alone is not allowed as witness and in the cases of violent offences competence of witness is not strictly examined. Descendants of a noble race and virtuous people are allowed as witnesses. If he is endowed with the qualities of virtuous person, one man alone can also be made a witness.[25]

With regard to the burden of proof he mentions that:

In a dispute between two litigants, the witnesses of that party have to be examined from which the plaint has proceeded. And in a case where the claim has been refuted as not agreeing with the facts there the witnesses of the defendant have to be examined as well. Hearsay evidence is not valid in law but he provides an exception. An appointed witness having died or gone abroad, those who have heard his deposition may give evidence. A witness who gives false evidence to save the life of a person is not blamed. [25.]

2) न राजाश्रोत्रियप्रत्नजितकितवतस्करपराधीनस्त्रीबालसाहसिकातिवृद्ध मत्तोन्मत्ताभिशस्तपतित क्षुत्तृष्णार्त्तव्यसनिरागान्धाः।; 5) एकश्चासाक्षी।; 6) स्तेयसाहसवाग्दण्डपारुष्यसंग्रहणेषु साक्षिणो न परीक्ष्यस्याः।; 8) कुलजा वृत्तवित्तसम्पन्ना यज्वानस्तपस्विनः पुत्रिणो धर्मज्ञा अधीयानाः सत्यवन्तस्त्रैविद्यवृद्धाश्च।; 9) अभिहितगुणसम्पन्न उभयानुमत एकोऽपि।; 10) द्वयोर्विवदमानयोर्यस्य पूर्ववादस्तस्य साक्षिणः प्रष्टव्या।; 11) आधय्य कार्य्यवशाद्यत्र पूर्वपक्षस्य भवेत् तत्र प्रतिवादिनोऽपि।; 12) उद्दिष्टसाक्षिणि मृते देशान्तरगते वा तदभिहितज्ञातारः प्रमाणम्।;[25]

Narājāśrotriyapratnajitakitavataskaraparādhīnastrībālasāhasikātivṛddha mattonmattābhiśastapatita kṣuttṛṣṇārttavyasanirāgāndhāḥ।; 5) ekaścāsākṣī।; 6) steyasāhasa-vāgdaṇḍapāruṣyasaṃgrahaṇeṣu sākṣiṇo na parīkṣyasyāḥ।; 8) kulajā vṛttavittasampannā yajvānastapasvinaḥ putriṇo dharmajñā adhīyānāḥ satyavantastraividyavṛddhāśca।;

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9) hitaguṇasampūrṇa ubhayānumata ekopi।; 10) dvayor-vivadamānayoryasya pūrvavādastasya sākṣiṇaḥ praṣṭavyā।; 11) ādhayya kāryyavaśādyatra pūrvapakṣasya bhavet tatra prativādinoapi।; 12) uddiṣṭasākṣiṇi mṛte deśāntaragate vā tadabhihitajñātāraḥ pramāṇam।;[25]

Max Muller editor of the Dharmasūtrās (translated by George Buhler) vide *The Sacred Books Of The East, Volume (āpastamba & Gautama)*. observes that:

"What I consider to be the sources of the mānava dharmaśāstra, the so-called Laws of Manu, are the sūtras"... "They form indeed the last branch of Vaidik literature."... I consider, therefore, the sūtras as the principal source of the metrical Smṛtis, "[26.]

Judicial functions of King: In the earliest stages of the society in ancient Bhārat administering justice was the function of the social groups of kulas and guilds. Thus community heads used to exercise the powers of administration of justice basing on the then existing customs and traditions. Definite history of development of law proper, it seems, started with the emergence and growth of the king as judge. It may be found that in the earliest dharmasūtrās, the 'King's administration of justice' was firmly established as an important function of the King.

Manu elaborates an idea of the divinity of Kings and observes that the subjects are under absolute obligation to obey his commands. Though his opinion has influenced and pervaded subsequent literature yet some have differed. In Gautama times, surprisingly, the concept of the divine personality of the King was not referred to. Gautama for instance, while observing that everybody must respect the King, nowhere deals with the concept of the divinity of the King. The historical basis as military chief to protect the people must have, over a period, contributed for his judicial authority. As such, he would naturally exercise the power to ensure people to obey his commands.

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In ancient Bhārat the King was not looked as either the source or even the repository of law. It is said that the law came down from times immemorial from the special knowledge of the sages. The said law itself imposed on the King a pious duty to maintain and uphold the law. The power and prestige of the King no doubt appear to have grown with time but the essence of law from the earliest Vedic times was that he should place himself under the guidance of the sages. The *ṛgveda* shows that it was his duty to choose his Purohita and be guided by him. It is stated in the dharma sūtrās of Viṣṇu that it is the duty of a King to choose a Purohita and be guided by him in performing his duties. As seen in Dharmasūtrās the king has to ascertain law from learned men and from the kulas and guilds to administer justice. It may be observed that the King is under obligation to exercise his powers to administer justice within the frame work of certain limitations basing on the principles of dhrama or natural justice. It indicates that sufficient care was taken to ensure that the personal prejudices should not influence the process of administration of justice.

In the days of the Dharmasūtrās, although the sphere of king's justice was growing yet civil justice must have been rarely required to be done by the King. *Gautama* and *āpastamba sūtrās* state that:

King's important functions appear to be mostly concerned with protection of people, punishment of crimes, and the maintenance of dharma or social order.[27].

As the judicial functions of the King grew, we find a twofold development. In the first place, the obligation of the King to know the law from competent authorities ie., sabhā and secondly, the judicial authority of the king came to be delegated to a prāḍvivākaḥ judge. In *Viṣṇu Dharmasūtrās* it is mentioned about the existence of the King's sabhā which fills an important place in later literature of law in connection with the administration of justice. Viṣṇu says as mentionemd in *Dharmasamhita Dasakam* that:

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Persons of unblemished form, of good character, who are holy and love truth are fit to be appointed as sabhāsadās or members of the sabhā, and that the sabhā functions in the administration of justice.[28]

स्वयमेव व्यवहारान् पश्येद्विद्वद्भिः ब्राह्मणैः सह। जन्मक्रमव्रतौपेताश्र राज्ञा सभासदः कार्या रिपौ मित्रे च ये समाः कामक्रोधलोभादिभिः कार्यार्थिभिरनाहार्याः।[28]

Svayameva vyavahārān paśyedvidvadbhiḥ brāhmaṇaiḥ saha। janmakramavrataupetāśra rājñā sabhāsadaḥ kāryā ripau mitre ca ye samāḥ kāmakrodhalobhādibhiḥ kāryārthibhiranāhāryāḥ। Dharmsamhita Dasakam.[28]

The outstanding feature of courts of ancient India was, however, the presence and the importance of the Sabhyās *(सभ्याः)*, or assessors learned in law, who were either appointed to help the Chief Judge or those who volunteered their opinions in courts, supported by the authority of texts of law. The sabhyās in the courts of ancient India were learned in law and gave their opinions both on questions of fact as well as of law.

The system of trial by jury or with the aid of assessors was unknown to Roman law or the earlier laws of Greece and Babylonia. The English people had trial by jury only in the later part of the Twelfth Century, although trial by jury was one of the demands in the Magna Carta, in the reign of King John in the eleventh century[29]

Although the existence of a sabhā and its role in guiding the King was referred to earlier in Vedic period, yet its enhanced importance in the matter of taking decisions in legal disputes is found in Manu and *Yājñavalkya.*

Other Dharmasūtrās: There were several other authors of Dharmasūtrās, whose works might have been lost. But their references are found in several commentaries and digests. Shankha and Likhita who were brothers were eminent jurists. They had

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composed a work of great merit and it is quoted as *Shankhalikhita* in the various commentaries. Usanas is one of the law givers to whom reference is made in *Yājñavalkyasmṛti.* It seems that the contemporary developments in law and traditions were handed down from generation to generation in these schools of sages and finally came to be embodied in works like Dharmasūtrās, etc. The development of the law in the King's court as evidenced by texts of the Dharmasūtrās clearly indicates that sound procedures in the matter of administration of justice were established by that time. It seems that outside the courts also there were apparently persons to whom the lay man would apply for advice on any point of law.

The importance of sūtra period is that the rules and procedures scattered here and there could be brought together and their legal character was properly described as vyavahāra . In smṛti literature which followed sutra period, these procedures have been further improved and properly codified almost on the lines of the procedures obtaining in the modern system of judicial administration. The elaborate legal procedures developed, thereafter, are discussed in detail in the next chapter under the head 'Judicial stystem in smṛti literature', main plank of the ancient judicial system.

End Notes:

1 *The Sacred Books Of The East, Volume (Apastamba & Gautama).* Bulher. Ed. F Max Muller. (Delhi. Motilal Banarsidass Publishers Pvt. Ltd., 2001) Apastamba Dharma Sutras, Vol.2, p.ix

2 Panduranga Vamana Kane. *History of Dharmaśāstrā,* Volume III. (Pune. Bhandarkar Oriental Research Institute, 1993) vol, iii p.xvii

3 *The Sacred Books Of The East, Volume (apastamba & Gautama).* Bulher. Ed. F Max Muller. (Delhi. Motilal Banarsidass Publishers Pvt. Ltd., 2001) Apastamba Dharma Sutras, 1-3

4 Ibid., Gautama Dharma Sutras, XI, 19-22, 25)

5 Ibid., VIII-1

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6 Ibid., X-7&8 p. 228

7 Ibid., XI-2-6&9

8 Ibid., XI-12, 14, 19

9 Ibid., X - 20-25&32

10 Ibid., XII-51.

11 Ibid., XIII, 1, 5-9, 12, 23-25&31

12 Ibid., Apastamba Dharma Sutras, vol 2, p. xi.

13 Ibid., Prasna II, Patala 10, Khanda 26-4, 6, 8, 9

14 Ibid., Prasna II, Patala 11, Khanda 28-(13) p.169

15 Ibid., Prasna II, Patala 11, Khanda 29-(1)

16 Ibid., Prasna II, patala, 11, khanda 29-5&6)

17 *The Sacred Books Of The East,* Volume 14 *(Vasishta & Boudhayana).* Bulher. Editor: F Max Muller. (Delhi. Motilal Banarsidass Publishers Pvt. Ltd, 2001) Vasista Dharma Sūtrās, I-10&11

18 Ibid., XV- 2 & 3

19 Ibid., XIX, 1, 4, 7, - 9

20 Ibid., VDS XVI, 1, - 4

21 Ibid., VDS , XVI, 10, 15

22 Ibid., XVI, 28 - 30

23 Ibid., Baudhāyana a Dharma Sutra, Prasna I, Adhyaya I, Kandika I -1-9

24 Ibid., Prasna I, Adhyaya I, Kandika I—12, 15, 16)

25 *Dharmasamhita Dasakam.* Ed. Prof. Rameshkumar. (Delhi. Amar Granth Publications, 2006) Ch.VIII-2, 5-6, 8-1526

26 *The Sacred Books of The East, Volume (Apastamba & Gautama).* Bulher. Ed. F Max Muller. (Delhi. Motilal Banarsidass Publishers Pvt. Ltd., 2001) Gautama Dharma Sutras, vol.II, p .ix.

27 Ibid., X -28 & APSD. II, 5, 11, 1-3.

28 *Dharmasamhita Dasakam.* Ed. Prof. Rameshkumar. (Delhi. Amar Granth Publications, 2006) 26- VDS, III- 72

29 *Encyclopaedia Britannica* Vol, III, on jury.

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Chapter - IV

Judicial system in smṛti Period

(King, the Chief Administrator of Justice)

Need to deal with the different kinds of disputes, relating to various segments of societies might have prompted to think for a detailed judicial system. Gradual developments of law from Sūtra period might have taken place over thousands of years. It is very difficult to precisely estimate the stages as to how the Gramini or guilds of kula of village level and the institution of the King of *ṛgvedic* times, gradually evolved into people's courts and various courts of different gradation presided over by King or those appointed by him as chief judge or judge.

In smṛti period the judicial procedure is more crystallized. A gradual development of code of justice had taken place in this era. The *Manusmṛti* was the first to introduce it. The *Yājñavalkyasmṛti* presented a more concise and systematic law code. But both of these smṛtis do not give judicial procedure as elaborately as it developed in later smṛtis. *Bṛhaspatismṛti* elaborately deals in judicial procedure and courts of law. The *Nāradasmaṛti* is an independent work on law. Its treatment of legal procedure is far more elaborate and technical. The *kātyāyanasmṛti* has further elaborated the legal dicta and raised them to still greater heights of refinement. Smṛtis dealt comprehensively all the aspects of the legal system ie.,

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description of the various courts their composition and location, qualifications of judges and other officers of courts including the assessors, procedures of law in relation to a legal dispute, its trial, evidence, and the judgement.

The institution of 'kingship' was established primarily to enforce dharma. For the purpose of maintaining dharma he is endowed with the power of Danda or awarding punishment. In *Manusmṛti* it is said that:

For the success of royal endeavours the creator Brahma first of all created dharma. Due to the fear of that scepter all beings-immobile and mobile are capable of enjoying pleasure and do not deviate from the path of law.[1]

तस्यार्थे सर्वभूतानां गोप्तारं धर्ममात्मजम्। ब्रह्मतेजोमयं दण्डमसृजत्पूर्वमीश्वरः।।

तस्य सर्वाणि भूतानि स्थावराणि चराणि च।

भयाद्भोगाय कल्पन्ते स्वधर्मान्नचलन्ति च।।[1]

tasyārthe sarvabhūtānāṃ goptāraṃ dharmamātmajam।

brahmatejomayaṃ daṇḍamasṛjatpūrvamīśvaraḥ।।

tasya sarvāṇi bhūtāni sthāvarāṇi carāṇi ca।

bhayādbhogāya kalpante svadharmānnacalanti ca।।[1]

After making a detailed survey of the Hindu judicial system and the historical evidence available, Sir S. Varadachariar in his treatise *The Hindu Judicial System* concludes as referred to in the **Fourteenth Report of the Law Commission of India.**

Whenever and wherever and so far as circumstances permitted, attempts were all along being made in Hindu India to administer justice broadly on the lines indicated in the law books.[2]

The detailed provisions made on the topics of law (vyavahāra pāda) are indicative of a fairly well developed system of administration of justice.

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The Dharmasūtrās and the *Arthaśāstra* reveal to us a more or less full-fledged and well developed judiciary. The king was at its head and he was to attend the court daily to decide disputes. It was his sacred duty to punish the wrong-doers; if he flinched from discharging it, he would go to hell. The Dharmaśāstrās and nītiśāstra literature regards the King as the fountain source of all justice. The King however was expected to be strictly impartial in deciding the cases or appeals that came before him. He was to decide according to law; otherwise he would be guilty. Dharma or law was regarded as based upon śrutis and Smṛtis, which were revered as super-human in origin. In *Bṛhadāraṇyaka upaniṣad* it is said that:

Law is the king of the king.[3]

तदेतत् क्षत्रस्य क्षत्रं यद्धर्मः।[3]

tadetat kṣatrasya kṣatraṃ yaddharmaḥ।[3]

Rājadharma is the quintessence of all dharmas. It ordained that the administration of justice is the personal responsibility of the King himself and thus gave prime importance to the administration of justice. King had to conduct himself in an impartial manner and provide justice to all who approach the court. He was required to preside over the highest court and impose punishment on the accused if found guilty without any bias. According to the smṛtis, one of the most important functions of the King was 'administration of justice' to ensure Justice to all and it is the personal concern of the king. In *Yājñavalkyasmṛti* it is said that:

Along with the learned brāhmins, the king, shorn of anger and avarice, should look after law-suits according to the codes of law.[4]

व्यवहारानृपः पश्येद्विद्वद्भिर्ब्राह्मणैः सह।
धर्मशास्त्रानुसारेण क्रोधलोभविवर्जितः।।[4]

vyavahārānṛpaḥ paśyedvidvadbhirbrāhmaṇaiḥ saha।
dharmaśāstrānusāreṇa krodhalobhavivarjitaḥ।।[4]

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In Śukranīti, a major treatise the same view is expressed that:

The king should attentively look after lawsuits by freeing himself from anger and greed according to the dictates of Dharmaśāstrās, in the company of the Chief Justice, Amātya, brāhmaṇa and Priest. It further says that the king should perform his duty by carefully studying the customs that are followed in countries and that are mentioned in the śāstrās, as well as those that are practiced by castes, villages, corporations, and families.[5]

धर्मशास्त्रानुसारेण क्रोधलोभविवर्जितः।
स प्राड्विवाकः सामात्यः सब्राह्मणपुरोहितः।।

समाहितमतिः पश्येद् व्यवहाराननुक्रमात्।
प्रत्यहं देशदृष्टैश्च शास्त्रदृष्टैश्च हेतुभिः।

जातिजानपदान् धर्माञ्छ्रेणिधर्मास्तथैव च।।
समीक्ष्य कुलधर्मांश्च स्वधर्मं प्रतिपालयेत्।।[5]

dharmaśāstrānusāreṇa krodhalobhavivarjitaḥ।
sa prāḍvivākaḥ sāmātyaḥ sabrāhmaṇapurohitaḥ।।

samāhitamatiḥ paśyed vyavahārānanukramāt।
pratyahaṃ deśadṛṣṭaiśca śāstradṛṣṭaiśca hetubhiḥ।

jātijānapadān dharmāñchreṇidharmāstathaiva ca।।
samīkṣya kuladharmāṃśca svadharmaṃ pratipālayet।।[5]

Manusmṛti also says that:

With an intention of examining court cases, the King should enter the court along with the brāhmins, expert in śāstrās and his ministers with appropriate humility.[6]

व्यवहारान्दिदृक्षुस्तु ब्राह्मणैः सह पार्थिवः।
मन्त्रज्ञैर्मन्त्रिभिश्चैव विनीतः प्रविशेत्सभाम्।।[6]

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vyavahārāndidṛkṣustu brāhmaṇaiḥ saha pārthivaḥ।
mantrajñairmantribhiścaiva vinītaḥ praviśetsabhām॥[6]

In *Mahābhārat* a great epic it is said that:

Whoever sits on the throne as King shall control his sense organs indriyas and treat friends and foes equally. As law abiding person who knows the principles of Dharma, King will make all the people to follow the rule of law.[7]

योहि राज्ये स्थितः शश्वद् वशी तुल्यप्रियाप्रियः॥
धर्मवर्त्मनि संस्थाप्य प्रजा वर्तेत धर्मतः॥
य एवं वर्तते राजन् स राजा धर्मनिश्चितः॥ [7]

yohi rājye sthitaḥ śaśvad vaśī tulyapriyāpriyaḥ॥
dharmavartmani saṃsthāpya prajā varteta dharmataḥ॥
ya evaṃ vartate rājan sa rājā dharmaniścitaḥ॥[7]

In *The Kauṭilīya Arthaśāstra* it is said that:

The King and his administration precisely cover various departments of the state. A King who observes his duty of protecting his people justly, according to law, goes to heaven, unlike one who does not protect his people, or inflicts unjust punishment.[8]

राजा राज्यमिति प्रकृतिसंक्षेपः।
राज्ञः स्वधर्मः स्वर्गाय प्रजा धर्मेण रक्षितः।
अरक्षितुर्वा क्षेप्तुर्वा मिथ्यादण्डमतोऽन्यथा॥ [8]

rājā rājyamiti prakṛtisaṃkṣepaḥ।
rājñaḥ svadharmaḥ svargāya prajā dharmeṇa rakṣitaḥ।
arakṣiturvā kṣepturvā midhyādaṇḍamato'nyathā॥[8]

He further observes that:

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Any matter in dispute shall be judged according to the four planks of justice. These, in order of increasing importance, are: Dharma, based on truth, Evidence based on witnesses, Custom, i.e., the tradition accepted by the people, and Royal Edicts, i.e., law as promulgated.[9]

धर्मश्च व्यवहारश्च चरित्रं राजशासनम्।
विवादार्थश्चतुष्पादः पश्चिमः पूर्वबाधकः।।

तस्य सत्ये स्थितो धर्मो व्यवहारस्तु साक्षिषु।
चरित्रं संग्रहे पुंसां राज्ञामाज्ञा तु शासनम्।।[9],

dharmaśca vyavahārarśca caritraṃ rājaśāsanam।
vivādārthaścatuṣpādaḥ paścimaḥ pūrvabādhakaḥ।।

tasya satye sthito dharmo vyavahārastu sākṣiṣu।
caritraṃ saṃgrahe puṃsāṃ rājñāmājñā tu śāsanam।।[9]

Bṛhaspatismṛti also says that there are four kinds of laws that are to be taken into consideration to arrive at a decision viz., :

dharma, vyavahāra, charitra and rājaśāsana.[10]

धर्मेण व्यवहारेण चारित्रेण नृपाज्ञया।
चतुष्प्रकारोऽभिहितः सन्दिग्धेऽर्थे विनिर्णयः।।[10]

dharmeṇa vyavahāreṇa cāritreṇa nṛpājñayā।
catuṣprakāro'bhihitaḥ sandigdhe'rthe vinirṇayaḥ।।[10]

Dharma refers to moral law or rules of justice, equity and good conscience. Vyavahāra refers to civil law as laid down in the smṛtis. Charitra refers to custom and rājaśāsana refers to King's edicts or ordinances. A King who administers justice in accordance with dharma, evidence, custom and written law will be able to conquer the whole world. According to Kautilya:

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"A King, who flouts the teachings of the Dharmaśāstrās and the Arthaśāstra, ruins the kingdom by his own injustice." [11]

चलितशास्त्रस्तु शास्त्रादन्यथाभिनिविष्टबुद्धिरन्यायेन राज्यमात्मानं चोपहन्तीति।[11]

calitaśāstrastu śāstrādanyathābhiniviṣṭabuddhiranyāyena rājyamātmānaṃ copahantīti।[11]

In deciding upon a case and performing his 'svadharma' viz; the administration of justice, the King should be very circumspect. He should carefully find out the customs that are local, temporal, social, domestic, national, etc. because the concept of dharma differs not only with time and place but also with jāti, śreṇi and kula. *Manusmṛti* says:

The King should decide the eighteen types of cases taking into consideration other factors like place cast family traditions, local usages besides the injunctions of the śāstrās according to their merits separately.[12]

त्यहं देशदृष्टैश्च शास्त्रदृष्टैश्च हेतुभिः।
अष्टादशसु मार्गेषु निबद्धानि पृथक् पृथक्।।[12]

tyahaṃ deśadṛṣṭaiśca śāstradṛṣṭaiśca hetubhiḥ।
aṣṭādaśasu mārgeṣu nibaddhāni pṛthak pṛthak।।[12]

In *smṛticandrika* it is said that:

A King, who systematically tries law suits with proper attention, will acquire widespread and lasting fame in his lifetime and reach the abode of Indra after death.[13]

धर्मशास्त्रं पुरस्कृत्य प्राड्विवाकमते स्थितः।
समाहितमतिः पश्येत् व्यवहाराननुक्रमात्।।

एवं पश्यन् सदा राजा व्यवहारान् समाहितः।
वितत्येह यशो दीप्तं शक्रश्यैति सलोकताम्।।[13]

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dharmaśāstrāṇi puruṣeṇa prāḍvivākamate sthitaḥ।

samāhitamatiḥ paśyet vyavahārānanukramāt।।

evaṃ paśyan sadā rājā vyavahārān samāhitaḥ।

vitatyeha yaśo dīptaṃ śakraśyaiti salokatām।।[13]

śukrācārya also in his moral treatise *Śukranīti* states that:

The King should attentively look after lawsuits by freeing himself from anger and greed and conduct the proceedings according to the dictates of Dharmaśāstrās, in the company of the Chief Justice, Amātya, brāhmaṇa and Priest.[14]

धर्मशास्त्रानुसारेण क्रोधलोभविवर्जितः।

सप्राड्विवाकः सामात्यः सब्राह्मणपुरोहितः।।

समाहितमतिः पश्येद् व्यवहाराननुक्रमात्। [14]

dharmaśāstrānusāreṇa krodhalobhavivarjitaḥ।

saprāḍvivākaḥ sāmātyaḥ sabrāhmaṇapurohitaḥ।।

samāhitamatiḥ paśyed vyavahārānanukramāt।[14]

In *kātyāyanasmṛti* as mentioned in *Vyavahāracintāmaṇi* it is said that:

The King examines cases with the help of judges who are steadfast, endowed with intelligence, who are scholars, conversant with the meaning of the prescriptions of the sacred law and proficient in the prescriptions of politics. He further observes that when the King sits over legal matters to decide as per sacred law all those persons involved in such process will get the highest benefit comparable to achieving heavenly abode.[15]

स तु सभ्यैः स्थिरैर्युक्तः प्रज्ञामूलैर्द्विजोत्तमैः।

धर्मशास्त्रार्थकुशलैरर्थशास्त्र विशारदैः।।

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सप्राड्विवाकः सामात्यः सब्राह्मणपुरोहितः।
ससभ्यः प्रेक्षकोराजा स्वर्गे तिष्ठति धर्मतः।।[15]

sa tu sabhyaiḥ sthirairyuktaḥ prajñāmūlairdvijottamaiḥ।
dharmaśāstrārthakuśalairarthaśāstra viśāradaiḥ।।
saprāḍvivākaḥ sāmātyaḥ sabrāhmaṇapurohitaḥ।
sasabhyaḥ prekṣakorājā svarge tiṣṭhati dharmataḥ।।[15]

The rules relied upon to decide a case should be in consonance with the sacred laws prescribed in smṛti. In the context of mutual inconsistency the rule of equity should dictate. According to *Bhavishya purana* as mentioned in *Vyavahāracintāmaṇi* of vācaspatimiśrā:

Smṛti should go along with politics. If not there would be a standstill situation. When smṛti and politics are inconsistent, the prescription of politics is superseded by smṛti; in case of mutual inconsistency, however, that rule is authoritative which is in accordance with equity.[16]

स्मृत्यर्धयोर्विरोधे तु अर्थशास्त्रस्य बाधनम्।
परस्परविरोधे तु न्याययुक्तं प्रमाणवत्।। [16]

smṛtyardhayorvirodhe tu arthaśāstrasya bādhanam।
parasparavirodhe tu nyāyayuktaṃ pramāṇavat।। [16]

The *Kauṭilīya Arthaśāstra* also says:

For, a King, giving decisions in accordance with law, transaction, settled custom and edict as the fourth would conqur the earth upto its four ends. He shall decide, with the help of law, a matter in which a settled custom or a matter based on a transaction contradicts the science of law. Where (a text of) the science may be in conflict with any edict in a matter of law, there the edict shall prevail; for, there the written text loses its validity.[17]

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अनुशासद्धि धर्मेण व्यवहारेण संस्थया।
न्यायेन च चतुर्थेन चतुरन्तां महीं जयेत्।।

संस्था या धर्मशास्त्रेण शास्त्रं वा व्यावहारिकम्।
यस्मिन्नर्थे विरुध्येत धर्मेणार्थं विनिर्णयेत्।।

शास्त्रं विप्रतिपद्येत धर्मे न्यायेन केनचित्।
न्यायस्तत्र प्रमाणं स्यात्तत्र पाठो हि नश्यति।।[17]

anuśāsaddhi dharmeṇa vyavahāreṇa saṃsthayā।
nyāyena ca caturthena caturantāṃ mahīṃ jayet।।
saṃsthā yā dharmaśāstreṇa śāstraṃ vā vyāvahārikam।
yasminnarthe virudhyeta dharmeṇārthaṃ vinirṇayet।।
śāstraṃ vipratipadyeta dharme nyāyena kenacit।
nyāyastatra pramāṇaṃ syāttatra pāṭho hi naśyati।।[17]

According to *Nāradīyamanu Saṃhitā* as mentioned in *Vyavahāracintāmaṇi* that:

When it is impossible to act up to the precepts of sacred law, it becomes necessary to adopt a method founded on reasoning, because custom decides everything and overrules the sacred law. He further says that the king is the assistant of the sacred law when two people are engaged in a lawsuit; he should investigate cases accurately, free from affection or hatred.[18]

धर्मशासत्र विरोधे तु युक्तियुक्तो विधिः स्मृतः।
व्यवहारो हि बलवान् धर्मस्तेनावहीयते।।

राजा धर्मसहायस्तु द्वयोर्विवादमानयोः।
सम्यक्कार्याण्यवेक्षेत रागद्वेषविवर्जितः।। [18]

dharmaśāsatra virodhe tu yuktiyukto vidhiḥ smṛtaḥ।
vyavahāro hi balavān dharmastenāvahīyate।।

rājā dharmasahāyastu dvayorvivādamānayoḥ।
samyakkāryāṇyavekṣeta rāgadveṣavivarjitaḥ।। [18]

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It is further stated *that: In a self-restrained King who conduc legal procedures according to the sacred law, seven virtues meet just a seven flames meet in the fire. It is also said that the King who conduc the legal procedure strictly as per the sacred laws without any bia to the parties involved is said to be highly virtuous and will achiev great material prosperity besides securing an abode of heaven. Th King would be benefited by the "The sacred law, material prosperity fame, worldly obedience, great regard on the part of his subjects, and could secure an eternal abode in heaven".*[19]

धर्मेणोध्धरतो राज्ञो व्यवहारान् कृतात्मनः।
सम्भवन्ति गुणाः सप्त सप्त वह्नेरिवार्चिषः।।

धर्मश्चार्थश्च कीर्तिश्च लोकपक्तिरुपग्रहः।
प्रजाभ्यो बहुमानश्च स्वर्गे स्थानं च शाश्वतम्।। [19]

dharmeṇodhdharato rājño vyavahārān kṛtātmanaḥ।
sambhavanti guṇāḥ sapta sapta vahnerivārciṣaḥ।।

dharmaścārthaśca kīrtiśca lokapaktirupagrahaḥ।
prajābhyo bahumānaśca svarge sthānaṃ ca śāśvatam।।[19]

As mentioned in *Vyavahāra Cintāmaṇi* Julius Jolly in his translation to *Nāradasmṛti* explained the Seven Flames as:

"The idea that fire is composed of seven rays or flames is derived, no doubt, from the seven rays of the sun-god sūrya, who is represented down to the present day as riding in a chariot drawn by seven horses".[20]

According to *nāradīyamanu Saṃhitā* as mentioned in *Vyavahāracintāmaṇi it is stated that:*

When the King sits down on the seat of the sacred law, let him be impartial towards all beings, carrying as it were the vow of the son of Vivasvat.[21]

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तस्माद्धर्मासने प्राप्य राजा विगतमत्सरः।
समः स्यात्सर्वभूतेषु भिभ्रद्धैवस्वतं व्रतम्।।[21]

tasmāddharmāsanaṃ prāpya rājā vigatamatsaraḥ।
samaḥ syātsarvabhūteṣu
bhibhraddhaivasvataṃ vratam।।[21]

The son of Vivasvat is Yama, the god of the dead who distributes reward or punishment according to one's good or bad actions respectively.

Substitution of the king: *Yājñavalkyasmṛti* says that:

A brāhmaṇa, knowing all forms of religious duties should be appointed as an administrator of justice along with those members, if the king is unable, for some pressing cause, to look after the law-suits himself.[22]

अपश्यता कार्यवशाद्व्यवहारानृपेण तु।
सभ्यै सह नियोक्तव्यो ब्राह्मणः सर्वधर्मवित्।।[22]

apaśyatā kāryavaśādvyavahārānṛpeṇa tu।
sabhyai saha niyoktavyo brāhmaṇaḥ sarvadharmavit।।[22]

Manu also says that: *If the king somehow feels disinclined to look after the state affairs, he may appoint one Prime Minister in his place who must be knower of the piety, intelligent and wise, self restrained and hailing from noble family.*[23]

अमात्यमुख्यं धर्मज्ञं प्राज्ञं दान्तं कुलोद्गतम्।
स्थापयेदासने तस्मिन् खिन्नः कार्येक्षणे नृणाम्।।[23]

amātyamukhyaṃ dharmajñaṃ prājñaṃ
dāntaṃ kulodgatam।
sthāpayedāsane tasmin khinnaḥ kāryekṣaṇe nṛṇām।।[23]

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In *Mahābhārat* also it is stated that if the King could not examine legal procedures, he can appoint a virtuous brāhmaṇa who lives according to sacred laws and is capable of handling legal matters. Word brāhmaṇa indicates a learned person without any relevance to caste system in the present day connotation. In *Mahābhārat* it is stated that:

A person endowed with the qualities of truth, charity, patience, good nature, compassion, penance, and kindness, is called a brāhmaṇa.[24]

सत्यं दानं क्षमाशीलमानृशंस्यं तपो घृणा।
दृश्यंते यत्र नागेन्द्र स ब्राह्मण इति स्मृतः।।[24]

satyaṃ dānaṃ kṣamāśīlamānṛśaṃsyaṃ tapo ghṛṇā।
dṛśyaṃte yatra nāgendra sa brāhmaṇa iti smṛtaḥ।।[24]

If the brāhmaṇa be not learned enough, in *Śukranīti* it is stated:

The king should appoint another person who is well versed in Dharmaśāstrās.[25]

यदा विप्रो न विद्वान् स्यात् क्षत्रियं तत्र योजयेत्।
वैश्यं वा धर्मशास्त्रज्ञं शूद्रं यत्नेन वर्जयेत्।।[25]

yadā vipro na vidvān syāt kṣatriyaṃ tatra yojayet।
vaiśyaṃ vā dharmaśāstrajñaṃ śūdraṃ yatnena varjayet।।[25]

Here the emphasis is on the requirement of possessing knowledge of the principles of sacred law and not any other factor. According to *Manusmṛti*:

The King or his representative should not fictitiously create a case or dismiss a case presented by somebody with an intention of realizing money.[26]

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नोत्पादयेत् स्वयं कार्यं राजा नाप्यस्य पूरुषः।
न च प्रापितमन्येन ग्रसेदर्थं कथञ्चन।।[26]

notpādayet svayaṃ kāryaṃ rājā nāpyasya pūruṣaḥ।
na ca prāpitamanyena grasedarthaṃ kathañcana।।[26]

Doctrine of separation of powers: Rājadharma made a clear distinction between judicial and executive and legislative functions. While the executive functions were required to be performed by the King on the advice of a council of ministers, judicial power was required to be exercised keeping in view the opinion of judges. And the parishad of learned men would play the role of legislation by providing necessary clarifications about the sacred law. In the matter of imposition of penalty the King was completely independent, and judges had no say in that regard.

The King was not entitled to make any law himself; he was simply to execute the law and apply it in deciding disputes for which he had both original and appellate jurisdiction. King's edict does not mean any legislative act passed by the King but it means his judicial decisions as the highest tribunal. The King simply executed and never formulated law except through adjudication. In this regard *Bṛhaspati Smṛti* also expresses the same view:

King has to follow the scriptures in taking judicial decisions; otherwise it may cause difficulties. Without avarice and anger with a composed mind he should decide strictly according to the rules of the scriptures keeping in view the local traditions and customs which only would ensure the welfare of the people.[27]

शास्त्रं केवलमाश्रित्य क्रियते यत्र निर्णयः।
व्यवहारः स विज्ञेयो धर्मस्तेनापि वर्धते।।

देशस्थित्याऽनुमानेन नैगमानुमतेन च।
क्रियते निर्णयस्तत्र व्यवहारस्तु बाध्यते।।

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विहाय चरिताचारं यत्र कुर्यात्पुनर्नृपः।
निर्णयं सा तु राजाज्ञा चरितं बाध्यते तया।।

धर्मशास्त्रानुसारेण सामात्यः सपुरोहितः।
व्यवहारान्नृपः पश्येत् प्रजासंरक्षणाय च।

क्रोधलोभविहीनस्तु सत्यवादी जितेन्द्रियः।।[27] .

śāstraṃ kevalamāśritya kriyate yatra nirṇayaḥ।
vyavahāraḥ sa vijñeyo dharmastenāpi vardhate।।

deśasthityā'numānena naigamānumatena ca।
kriyate nirṇayastatra vyavahārastu bādhyate।।

vihāya caritācāraṃ yatra kuryātpunarnṛpaḥ।
nirṇayaṃ sā tu rājājñā caritaṃ bādhyate tayā।।

dharmaśāstrānusāreṇa sāmātyaḥ sapurohitaḥ।
vyavahārānnṛpaḥ paśyet prajāsaṃrakṣaṇāya ca।
krodhalobhavihīnastu satyavādī jitendriyaḥ।।[27] .

Justice Gajendra Gadkar, former Chief Justice of India in the *46th Report of the Law Commission* observes:

"The Commission believes that, in a democratic country like India which is governed by a written Constitution, supremacy can be legitimately claimed only by the Constitution. It is the Constitution which is paramount, which is the law of laws, which confers on Parliament and the State Legislatures, the Executive, and the Judiciary, their respective powers, assigns to them their respective functions, and prescribes limitations within which the said powers and functions can be legitimately discharged." [28]

To avoid clash between these three branches the doctrine of separation of powers is envisaged. It paves way for smooth

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functioning of all the three branches. The most important aspect of the said doctrine is to ensure judicial independence from administrative directions. It is surprising that in such remote past, under the Ancient Indian Judicial system also we find that the importance of doctrine of separation of powers had been conceived and evolved. King or the judges appointed by him were to simply follow the provisions of sacred law. They were not given any power to formulate laws. King's executive powers are entirely different and not supposed to meddle with the judicial concepts prescribed in smṛtis. It is noteworthy that the independence of three branches ie., Legislative, Executive and Judiciary were maintained ensuring judicial independence from administrative directions.

King not to Legislate: According to *kātyāyanasmṛti* as mentioned in *Vyavahāracintāmaṇi*:

King should decide cases according to rules of Śāstrās. In the absence of a provision in the texts he should follow the usages. King should never act according to his own fiat. Such an action on the part of the King causes danger to him and brings ruin to the people. It may be observed that apart from not recognizing the power to make law in the King, Dharmaśāstrās positively ordained that the King shall not legislate.[29]

तस्माच्छास्त्रानुसारेण राजा कार्याणि साधयेत्।
वाक्याभावे तु सर्वेषां देशदृष्टेन सन्नयेत्।।

अस्वर्ग्या लोकनाशाय परानीकभयावहा।
आयुर्बीजहरी राज्ञां सति वाक्ये स्वयं कृतिः।।[29]

tasmācchāstrānusāreṇa rājā kāryāṇi sādhayet।
vākyābhāve tu sarveṣāṃ deśadṛṣṭena sannayet।।

asvargyā lokanāśāya parānīkabhayāvahā।
āyurbījaharī rājñāṃ sati vākye svayaṃ kṛtiḥ।।[29]

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Parishad to make new law: The power to decide complicated questions of law by resolving the conflicts or to lay down a new legal provision was recognized in an assembly of persons with prescribed qualifications, called the Parishad. In *Manusmṛti* discerning the need and its composition it is said that:

In a critical situation, a dasavara dharma parishad, an assembly of sista brāhmaṇās should be appointed and if it is not possible only of three such brāhmaṇās should be approached and whatever decision it makes should be accepted scrupulously with no doubt in the mind. The three experts of the three Vedās each, scholars of nyāya(न्यायः), mīmāṃsa, Niruktam and Dharmaśāstrās one from each branch and three representatives of three āśramās (except saṃnyāsa) should make a dasavara dharma pariṣad. Tryavarā pariṣad should consist of three experts in ṛg, Yaju and Sāma respectively. Its decision in questionable religious matters may be final. If there is a single brāhmaṇa expert in Vedic knowledge and he defines something to be Dharma it should be taken as supreme Dharma. A decision contrary to his opinion, given by even ten thousand fools is not Dharma. Such brāhmaṇas even thousand in number, who do not observe vows like Brahmacarya etc., who have no knowledge of Veda Mantras and who are brāhmaṇas only for the name's sake do not deserve to be the members of the pariṣad.[30]

दशावरा वा परिषद्यं धर्मं परिकल्पयेत्।
त्र्यवरा वापि वृत्तस्था तं धर्मं न विचालयेत्।।

त्रैविद्यो हेतुकस्तर्की नैरुक्तो धर्मपाठकः।
त्रयश्चाश्रमिणः पूर्वे परिषत्स्याद्दशावरा।।

ऋग्वेदविद्यजुर्विच्च सामवेदविदेव च।
त्र्यवरा परिषज्ज्ञेया धर्मसंशयनिर्णये।।

एकोपि वेदविद्धर्मं यं व्यवस्येद् द्विजोत्तमः।
स विज्ञेयः परो धर्मो नाज्ञानामुदितोअयुतैः।।

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अव्रतानाममन्त्राणां जातिमात्रोपजीविनाम्।
सहस्रशः समेतानां परिषत्त्वं न विद्यते।। [30]

daśāvarā vā pariṣadyaṃ dharmaṃ parikalpayet।
tryavarā vāpi vṛttasthā taṃ dharmaṃ na vicālayet।।

traividyo hetukastarkī nairukto dharmapāṭhakaḥ।
trayaścāśraminaḥ pūrve pariṣatsyāddaśāvarā।।

ṛgvedavidyajurvicca sāmavedavideva ca।
tryavarā pariṣajjñeyā dharmasaṃśayanirṇaye।।

ekopi vedaviddharmaṃ yaṃ vyavasyed dvijottamaḥ।
sa vijñeyaḥ paro dharmo nājñānāmuditoayutaiḥ।।

avratānāmamantrāṇāṃ jātimātropajīvinām।
sahasraśaḥ sametānāṃ pariṣattvaṃ na vidyate।। [30]

It may be observed that in the Dharmasūtrās and the Dharmaśāstrās themselves no legislative competence was recognized in the institution of King. The ancient Indian sages not only made new laws but they also made provisions for repealing certain existing laws and practices. Thus, Hindu Law was made not by Kings but by the sages who though had no political authority had the fullest social authority commanding the highest reverence. Necessarily the legislations by the sages were not in the shape of enactments but in the form of scriptural literature, which had come down to us.

Exceptions to legal procedure: According to *Nāradasmṛti* as mentioned in *Vyavahāracintāmaṇi:*

A legal procedure cannot be instituted between people who are closely related, such as teacher and student, father and son, husband and wife, master and servant.[31]

गुरुशिष्यौ पितापुत्रौ दम्पती स्वामिभृत्यकौ।
एतेषां समवेतानां व्यवहारो न सिध्यति।।[31]

guruśiṣyau pitāputrau dampatī svāmibhṛtyakau।
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eteṣaṃ samavetānaṃ vyavahāro na sidhyati।।[31]

kātyāyanasmṛti as mentioned in *Vyavahāracintāmaṇi* also says that:

When the King does not conduct as per the sacred laws and awards an erroneous order the judges should question and put in effort to stall such unrighteous orders otherwise they would not be free from guilt.[32]

अधर्मज्ञां यदा राजा नियुंजीत विवादिनाम्।
विज्ञाप्य नृपतिं सभ्यस्तदा सम्यक् निवर्तयेत्।।[32]

adharmajñāṃ yadā rājā niyuṃjīta vivādinām।
vijñāpya nṛpatiṃ sabhyās tadā samyak nivartayet।।[32]

A surety should be taken from both parties who approach the court for the sake of a decree. It is stated in *Yājñavalkyasmṛti* that:

F*or both one should take a surety that is adequate for the decision of the cause. In the cases relating to the use of abusive language and those about beating and destruction with poisoned weapons one can bring a counter charge: Surety capable of paying the fine or the decreed amount when the case is decided, should be taken from both the parties.*[33]

कुर्यात्प्रत्यभियोग च कलहे साहसेषु च।
उभयोः प्रतिभूर्ग्राह्यः समर्थः कार्यनिर्णये। [33]

kuryātpratyabhiyoga ca kalahe sāhaseṣu ca।
ubhayoḥ pratibhūrgrāhyaḥ samarthaḥ kāryanirṇaye।[33]

This is required because of the possibility of the party who loses the case may run away for fear of punishment or penalty.

Adjournments: In this connection Kātyāyana says that:

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An adjournment may not be granted to the plaintiff, since he had for a long time decided to institute the case; the defendant, however, may take advantage of an adjournment.[34]

यस्मात्कार्यसमारम्भश्चिरात्तेन विनिश्चितः।
तस्मान्नलभते कालमभियुक्तस्तु कालभाक्।। [34]

yasmātkāryasamārambhaścirāttena viniścitaḥ।
tasmānnalabhate kālamabhiyuktastu kālabhāk।।[34]

Nāradīyamanu Saṃhitā says that:

The defendant may take advantage of an adjournment of three days or even five days.[35]

प्रत्यर्थी लभते कालं त्र्यहं पञ्चाहमेव वा। [35]

pratyarthī labhate kālaṃ tryahaṃ pañcāhameva vā।[35]

It only shows that it was very difficult for the parties to obtain adjournments in ancient judiciary system. Bṛhaspati makes a way by saying that:

When the plaintiff is unable to speak out of timidity, an adjournment may be granted the duration of which varies according to the importance of the case.[36]

अभियोक्ताप्रगल्भत्वादुक्तं नोत्सहते यदि।
तस्य कालः प्रदातव्यः कार्यस्यशक्त्यनुरूपतः।।[36]

abhiyoktāpragalbhatvāduktaṃ notsahate yadi।
tasya kālaḥ pradātavyaḥ kāryasyaśaktyanurūpataḥ।।[36]

Sound procedures in the matter of administration of justice as envisaged in the smṛti texts presuppose the availability of number of courts. Gradation and structure of these courts are discussed in the next chapter.

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End Notes

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i) Structure of Courts

In the Dharmasūtrās, the law courts acquired a shape which was more clear and regular than that found in *Vedās*. Structure and functioning of courts are further improved in smṛti period. The smṛti texts lay down that the King assisted by learned brāhmaṇas, should carefully administer justice in order to strengthen the stability of society. Manu and Nārada call the court of justice as "dharmāsanam". *Manusmṛti* says that:

With an intention of examining court cases, the King should enter the court along with the brāhmins expert in śāstrās and his ministers with appropriate humility. The dharmādhikāri must occupy his seat, dharmāsanam having him dressed properly. After saluting Lokapalas with a controlled mind, he should start attending to the cases.[1]

व्यवहारान्दिदृक्षुस्तु ब्राह्मणैः सह पार्थिवः।
मन्त्रज्ञैर्मन्त्रिभिश्चैव विनीतः प्रविशेत्सभाम्।।

धर्मासनमधिष्ठाय संवीताङ्गः समाहितः।
प्रणम्य लोकपालेभ्यः कार्यदर्शनमारभेत्।। [1]

vyavahārāndidṛkṣustu brāhmaṇaiḥ saha pārthivaḥ।
mantrajñairmantribhiścaiva vinītaḥ praviśetsabhām।।

dharmāsanamadhiṣṭhāya saṃvītāṅgaḥ samāhitaḥ।
praṇamya lokapālebhyaḥ kāryadarśanamārabhet।। [1]

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In Bṛhaspatismṛti four kinds of sabhā or courts are described:

Pratiṣṭhitā or established in a place; apratiṣṭhitā or moving from place to place; mudritā or the court in which the chief judge is an appointee of the king and has the royal seal; śaśita or the court headed by king himself. Pratiṣṭhitā is a court which is established at a particular village or town, whereas apratiṣṭhitā is a mobile court, moving from village to village. mudritā is a court appointed by the king and authorized to use the royal seal. Śaśita is the court over which the king himself presides. [2]

प्रतिष्ठिताऽप्रतिष्ठा च मुद्रिता शासिता तथा।
चतुर्विधा सभा प्रोक्ता सभ्याश्चैव तथाविधाः।।

प्रतिष्ठिता पुरे ग्रामे चला नामाप्रतिष्ठिता।
मुद्रिताऽध्यक्षसंयुक्ता राजयुक्ता च शासिता।। [2]

pratiṣṭitā'pratiṣṭā ca mudritā śāsitā tathā।
caturvidhā sabhā proktā sabhyāścaiva tathāvidhāḥ।।

pratiṣṭhitā pure grāme calā nāmāpratiṣṭhitā।
mudritā'dhyakṣasaṃyuktā rājayuktā ca śāsitā।। [2]

According toBṛhaspati :

the court of justice should be situated in the eastern direction and should face east. In the hall of justice the king faces the east; the sabhyās north; the gaṇaka west; and Lekhaka south. There should be garlands, incense of dhūpa, seats, seeds and jewels as well as statues, paintings, idols of gods such as sun and moon etc. fire, and water.[3]

प्राग्दिशि प्राङ्मुखीं तस्य लक्षण्यां कल्पयेत्सभाम्।
माल्यधूपासनोपेतां बीजरत्नसमन्विताम्।।

प्रतिमालेख्यदेवैश्च युतामग्न्यम्बुना तथा।
लक्षण्यां वास्तुशास्त्रोक्तलक्षणेन तु लक्षिताम्।।

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पूर्वामुखस्तूपविशेद्राजा सभ्या उदङ्मुखाः।
गणकः पश्चिमास्यस्तु लेखको दक्षिणामुखः।। [3]

prāgdiśi prāṅmukhīṃ tasya lakṣaṇyāṃ kalpayetsabhām।
mālyadhūpāsanopetāṃ bījaratnasamanvitām।।

pratimālekhyadevaiśca yutāmagnyambunā tathā।
lakṣaṇyāṃ vāstuśāstroktalakṣaṇena tu lakṣitām।।

pūrvāmukhastūpaviśedrājā sabhyā udaṅūmukhāḥ।
gaṇakaḥ paścimāsyastu lekhako dakṣiṇāmukhaḥ।। [3]

Bṛhaspati devides the *sabhā* into ten parts. These are:

The King, the chief judge, the sabhyās, smṛtis, gaṇaka or accountant, Lekhaka or scribe, gold, fire, water, and Svapurusa or bailiff. The chief judge pronounces the sacred law; the king awards punishment; the sabhyās look into the trial; the smṛtis ordain the rule of decision on the success of one party and the punishment to other; gold and fire are needed for taking oaths; water is needed for drinking; the gaṇaka counts the money or goes into the subject matter of trial; the Lekhaka notes down the pleadings, depositions, and the decision; the bailiff calls the sabhyās, the defendant, and witnesses, and guards the complainant and the defendant when they have furnished no surety.[4]

हिरण्यमग्निमुदकं धर्मशास्त्राणि चैव हि।
तन्मध्ये स्थायेद्राजा पुण्यानि च हितानि च।।

आदित्यचन्द्रदेवादि दिक्पालान् तत्र कल्पयेत्।
नृपोऽधिकृतसभ्याश्च स्मृतिर्गणकलेखकौ।

हेमाग्न्यम्बुस्वपुरुषाः साधनाङ्गानि वै दश।।
दशानामपि चैतेषां कर्म प्रोक्तं पृथक् पृथक्।

वक्ताऽध्यक्षो नृपः शास्ता सभ्यः कार्यपरीक्षकः।।
स्मृतिर्विनिर्णयं ब्रूते जयदानं दमं तथा।

शपथार्थे हिरण्याग्नी अम्बु तृषितजन्तुषु।।

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गणको गमयेदर्थं लिखेन्न्यायं च लेखकः।
प्रत्यर्थिसभ्यानयनं साक्षिणं च स्वपूरुषः।।[4]

hiraṇyamagnimudakaṃ dharmaśāstrāṇi caiva hi।
tanmadhye sthāyedrājā puṇyāni ca hitāni ca।।
ādityacandradevādi dikpālān tatra kalpayet।
nṛpo'dhikṛtasabhyāśca smṛtirgaṇakalekhakau।
hemāgnyambusvapuruṣāḥ sādhanāṅgāni vai daśa।।
daśānāmapi caiteṣāṃ karma proktaṃ pṛthak pṛthak।
vaktā'dhyakṣo nṛpaḥ śāstā sabhyaḥ kāryaparīkṣakaḥ।।
smṛtirvinirṇayaṃ brūte jayadānaṃ damaṃ tathā।
śapathārthe hiraṇyāgnī ambu tṛṣitajantuṣu।।
gaṇako gamayedarthaṃ likhennyāyaṃ ca lekhakaḥ।
pratyarthisabhyānayanaṃ sākṣiṇaṃ ca svapūruṣaḥ।।[4]

Kātyāyana and Bṛhaspati prescribe specific time for holding the court.

The whole day has been divided into eight parts. In the first part the king should perform daily duties and the next three parts of the day have been considered best for looking into disputes.[5]

दिवसस्याष्टमं भागं मुच्क्त्वा कालं सुसंविशेत्।
स कालो व्यवहाराणां शास्त्रदृष्टः परःस्मृतः।। [5]

divasasyāṣṭamaṃ bhāgaṃ mucktvā kālaṃ susaṃviśet।
sa kālo vyavahārāṇāṃ śāstradṛṣṭaḥ paraḥsmṛtaḥ।।[5]

Peoples' Courts: Many other institutions are described in smṛtis which decide the disputes. These institutions of private arbitration are quite close to the modern pañcāyats. These are kulāni śreṇi, pūga, and gaṇa. These courts are mentioned in the

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descending order of importance, each succeeding one being superior to the preceding one. Yājñavalkya describes them as people courts sanctioned by the King. He says that:

The 'pūgas' are the unions of citizens of village. śreṇyās are corporate bodies and kulāni consist of friends and relatives. These courts are superior in order of precedence.[6]

नृपेणाधिकृताः पूगाः श्रेणयोऽथ कुलानि च।
पूर्वं पूर्वं गुरु ज्ञेयं व्यवहारविधौ नृणाम्।। [6]

nṛpeṇādhikṛtāḥ pūgāḥ śreṇayo'tha kulāni ca।
pūrvaṃ pūrvaṃ guru jñeyaṃ vyavahāravidhau nṛṇām।।[6]

For an appeal of a law suit, decided by kulani the appellant should approach śreṇi and for second appeal he should approach pūga. These unions were something like Law Courts.

According to Kātyāyana and Bṛhaspati also the court presided over by the King was the highest court. Among the other courts some of them appointed by the King and the others were peoples' court recognized by the smṛtis as having the power to administer justice. Bṛhaspati also gives the details of different courts.

i) Kula are the gatherings or family council; ii) śreṇi Corporation of traders; iii) Gaṇa is the assembly of brāhmaṇas; iv) adhikṛta is the Court appointed by the King. v) nṛpa the King's court where the King himself presides. These are different kinds of courts, invested with the power to decide cases. Among these each of the courts mentioned later is superior to the one mentioned earlier.[7]

कुलानि श्रेणयश्चैव गणस्त्वधिकृतो नृपः।
प्रतिष्ठा व्यवहाराणां गुर्वेभ्यस्तूत्तरोत्तरम्।।[7]

kulāni śreṇayaścaiva gaṇastvadhikṛto nṛpaḥ।
pratiṣṭhā vyavahārāṇāṃ gurvebhyastūttarottaram।।[7]

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In *smṛticandrika* also it is stated that:

A gathering of impartial persons belonging to the family or caste of the litigants, functioning as pañchāyat mandal to decide disputes among those belonging to the same family or caste constitutes the court of "Kula". Corporation of persons following the same profession or trade is known as the court of śreṇi. An Assembly of persons belonging to one place but to different castes or following different avocations is called the court of Gaṇa.[8]

Special Courts: According to Bṛhaspati:

The cases of the foresters should be tried in forest, the soldiers should be tried in military courts, and the members of caravans and traders should be tried in their own courts. He further ordains that the disputes of husbandmen, craftsmen such as carpenters, artisans such as painters, money-lenders' guilds, dancers, sects such as Pasupatas and criminal tribes should be decided by their own conventions and usages.[9]

ये चारण्यचरास्तेषामरण्ये करणं भवेत्।
सेनायां सैनिकानां तु सार्थेषु वणिजां तथा।।

कीनाशाः कारुका मल्लाः कुसीदश्रेणिवर्तकाः।
लिङ्गिनस्तस्कराश्चैव स्वेन धर्मेण निर्णयः।।[9]

ye cāraṇyacarāsteṣāmaraṇye karaṇaṃ bhavet।
senāyāṃ sainikānāṃ tu sārtheṣu vaṇijāṃ tathā।।

kīnāśāḥ kārukā mallāḥ kusīdaśreṇivartakāḥ।
liṅginastaskarāścaiva svena dharmeṇa nirṇayaḥ।।[9]

Administration of justice is no doubt one of the most important functions of the State according to the modern notions. The average citizen becomes conscious of the existence of the state and of its coercive power when he sees the courts functioning and

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their decisions enforced both in civil and criminal cases. The court is no doubt the most majestic symbol of the power of the State.

Besides administering the rules embodied in Dharmaśāstrās, courts enforced jati-dharmās (rules of castes) janapada-dharmās (local customs), śreṇi-dharmās (bye-laws of guilds) kula dharmās (family traditions), in so far as they created civil and legal rights. *Manusmṛti* says that:

While deciding a case the King should discharge his duties having in full consideration the Dharma of caste, place, śreṇi (guild), the lineage and the dharma of his own as king.[10]

जातिजानपदान्धर्मान्श्रेणीधर्माश्च धर्मवित्।
समीक्ष्य कुलधर्मांश्च स्वधर्मं प्रतिपादयेत्।।[10]

jātijānapadāndharmānśreṇīdharmāśca dharmavit।
samīkṣya kuladharmāṃśca svadharmaṃ pratipādayet।।[10]

Jurisdiction of Courts: It is mentioned in *Bṛhaspatismṛti* that:

The Kula, śreṇi and gaṇa courts could decide all disputes except those falling under the title sāhasa. *Fines and corporal punishments could only be inflicted by the King. The people's courts consisted of pañcāyatdars. They had the authority to decide all civil and criminal cases except those involving trial for an offence committed with violence viz., sāhasa. They had no authority to execute sentences of fines and corporal punishments. The matter had to go before the King, who alone could execute such sentences if it met with his approval. A śreṇi can review the decision of a Kula, and a gaṇa has the power to review the decision of a śreṇi. Judges have power to review the decisions of a gaṇa, and the King is the highest court of appeal and his decision is final.*[11]

राज्ञा ये विदिताः सम्यक् कुलश्रेणिगणादयः।
साहसन्यायवर्ज्यानि कुर्युः कार्याणि ते नृणाम्।।

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कुलश्रेणिगणाध्यक्षाः प्रोक्ता निर्णयकारकाः।
विचार्य श्रेणिभिः कार्यं कुलैर्यन्न विचारितम्।।

गणैश्च श्रेण्यविज्ञातं गणाज्ञातं नियुक्तकैः।
कुलादिभ्योऽधिकाः सभ्यास्तेभ्योऽध्यक्षः स्मृतोऽधिकः।।

सर्वेषामधिको राजा धर्मं यत्नेन निश्चितम्।
उत्तमाधममध्यानां विवादानां विचारणात्।। [11]

rājñā ye viditāḥ samyak kulaśreṇigaṇādayaḥ।
sāhasanyāyavarjyāni kuryuḥ kāryāṇi te nṛṇām।।

kulaśreṇigaṇādhyakṣāḥ proktā nirṇayakārakāḥ।
vicārya śreṇibhiḥ kāryaṃ kulairyanna vicāritam।।

gaṇaiśca śreṇyavijñātaṃ gaṇājñātaṃ niyuktakaiḥ।
kulādibhyo'dhikāḥ sabhyāstebhyo'dhyakṣaḥ
smṛto'dhikaḥ।।

sarveṣāmadhiko rājā dharmaṃ yatnena niścitam।
uttamādhamamadhyānāṃ vivādānāṃ vicāraṇāt।। [11]

Kula court has been defined by the *Mitākṣarā* an outstanding commentary on *Yājñavalkyasmṛti* by vijñāneśvara, as consisting of a group of relations, near or distant. Kulas or joint families were often vey extensive in ancient India; if there was a quarrel between two members, the elders used to attempt to settle it. He says that:

The kulās *court was this informal body of family elders.*[12]

कुलानि ज्ञातिसंबंधिबंधूनां समूहः कुलम्। [12]

kulāni jñātisaṃbaṃdhibaṃdhūnāṃ samūhaḥ kulam। [12]

nāradīyamanu Saṃhitā as mentioned in *Vyavahāracintāmaṇi* says:

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In the case of merchants, artisans farmers, and stage-players, a decision is not possible; here persons who themselves know the nature of these trades should be allowed to take charge.[13]

वणिक्शिल्पिप्रयोगेषु कृषिरङ्गोपजीविषु।
अशक्यो निर्णयो ह्यत्र तत्त्वज्ञैरेव कारयेत्।। [13]

vaṇikśilpiprayogeṣu kṛṣiraṅgopajīviṣu।
aśakyo nirṇayo hyatra tattvajñaireva kārayet।। [13]

This is an illustrative statement; it means, that each and every case must be decided in association with persons who are experts in that field. Present day special courts to deal with the army and other specific groups must have evolved from these special courts.

When the effort at family arbitration failed, the matter used to be taken to the śreṇi court. The term śreṇi was used to denote the courts of guilds, which became a prominent feature of the commercial life in ancient India. They are frequently mentioned in the Budhist literature and in the *Mahābhārat*. Disputes among the members of the commercial units used to be settled in these courts. Though mentioned for the first time by Yājñavalkya , the śreṇi court might well be placed a few centuries earlier. There is definite evidence to show that guild courts continued to function down the 18th century in mahārāṣṭra; probably the same was the case in the rest of the country. According to the fourteenth report of the *First Law Commission of India:*

Popular tribunals, particularly the village courts, survived for a long time and existed even at the time of the commencement of the British rule in India.[14] *Their continuance was favoured by their antiquity and the absence of any other effective tribunals within easy reach; the structure of the village society in those days; the nature of the principal functions which these tribunals discharged which were conciliatory; and the non-interference by local rulers with the working of these tribunals.*[14]

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The pūga court of Yājñavalkya consisted of members belonging to different castes and professions, but staying in the same village or town. If the sabhā or the village assembly of the Vedic period was occasionally settling the village disputes, the sabhā court would be the earlier prototype of the pūga court. Grāmyavādi of the *taittirīya- Saṃhitā* would be probably a member of that court. The Grāmavriddha court of the *Arthaśāstra* would also appear to be the forerunner of the pūga court.

In *Śukranīti* it is stated that:

The members of a guild or a village Panchayat have more or less reliable knowledge of the fact in dispute and the grounds for quarrel as the parties belonged to their guild or locality. This is based on the principle of local judges for local cases.[15]

अभियुक्ताश्च ये यत्र यन्निबन्धनियोजना:।
तत्रत्यगुणदोषाणां त एव हि विचारका:।। [15]

abhiyuktāśca ye yatra yannibandhaniyojanāḥ।
tatratyaguṇadoṣāṇāṃ ta eva hi vicārakāḥ।। [15]

A.S.Atlekar in his book *State and Government in Ancient India* traces the origin and development of the village courts as under:

It was the considered and long-established policy of the governments in ancient India to encourage these popular courts and to enforce their decision. Though these courts were essentially non-official they had the royal authority behind them. In ancient India these village Pañcāyats and guild courts were appreciated and encouraged by the then rulers for several reasons. They believed in the principle of self-government and decentralization of authority right up to grass root level. They reduced the burden of the central administration by following the theory of proper delegation. And above all they helped for securing the justice without much delay.[16]

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A.S.Atlekar further says that:

There was no limit to the jurisdiction of the popular courts in civil matters. They could not, however, try criminal cases of a serious nature. Minor offences, including even accidental homicides, could however, be disposed of by them. The parties to a suit had to pay 'stamp duties'. It was 10% in the case of the successful litigant and 5% in the case of his opponent. A portion of the income from this source was utilized for the payment to the bailiff and clerk of the court, and a portion was paid as an honorarium to the Panchas".[16]

As regards the existence of these courts, after considering the historical evidence and the indications available there from, the Law Commission in its *Fourteenth Report* has said:

"Though ancient writers have outlined a hierarchy of courts as having existed in the remote past, the exact structure that obtained cannot be ascertained with any definiteness; but later works of writers like Nārada, Bṛhaspati *and others seem to suggest that regular courts must have existed on a considerable scale, if the evolution of a complex system of procedural rules and of evidence can be any guide. Popular tribunals, particularly the village courts, survived for a long time and existed even at the time of the commencement of the British rule in India. Their continuance was favoured by their antiquity and the absence of any other effective tribunals within easy reach; the structure of the village society in those days; the nature of the principal functions which these tribunals discharged which were conciliatory; and the non-interference by local rulers with the working of these tribunals. The law of evidence, and the law of procedure certainly indicate that unless these laws were being followed in the course of the functioning of these courts, there would not have been such an advancement in that sphere".*[17]

Court Staff: Kautilya in his treatise *The Kauṭilīya Arthaśāstra* says:

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If the clerk does not write what is said, writes what is not said, writes correctly what is badly spoken, writes inaccurately what is well spoken, or modifies the sense conveyed, he shall impose the lowest fine for violence on him or (punishment) in accordance with the offence.[18]

लेखकश्चेद् उक्तं न लिखति, अनुक्तं लिखति, दुरुक्तमुपलिखति, सूक्तमुल्लिखति, अर्थोत्पत्तिं वा विकल्पयति, इति पूर्वमस्मै साहसदण्डं कुर्याद्, यथापराधं वा।[18]

lekhakaśced uktaṃ na likhati, anuktaṃ likhati, duruktamupalikhati, sūktamullikhati, arthotpattiṃ vā vikalpayati, iti pūrvamasmai sāhasadaṇḍaṃ kuryād, yathāparādhaṃ vā।[18]

The accountant, the scribe and the Bailiff are the non-judicial officers of the court. The smṛtis, gold, fire and water are the four things which should be kept ready in the court hall. He further says that the King is invested with the power of passing final decrees. The chief justice has to give his final opinion in the cases and the duty of the judges is to investigate the merits of each case.

With regard to the details as to how a court clerk has to record the proceedings *The Kauṭilīya Arthaśāstra* says:

After writing down the year, the season, the month, the fortnight, the day, the office, the place, the debt, and the country, village, caste, family, name and occupation of the plaintiff and the defendant, who have given adequate sureties, the (clerk) shall put down the questions (with answers) to the plaintiff and the defendant, in due order of the subject-matter. And he shall look into them when put down. And there shall be no suit against the accused (by another party.)[19]

संवत्सरमृतुं मासं पक्षं दिवसं करणमधिकरणमृणं वेदकावेदकयोः कृतसमर्थाव स्थयोर्देशग्रामजातिगोत्रनामकर्माणि चाभिलिख्य वादिप्रतिवादिप्रश्नानर्थानुपूर्व्या निवेशयेत्। निविष्टांश्चावेक्षेत। न चाभियुक्तेऽभियोगोऽस्ति। [19]

saṃvatsaramṛtuṃ māsaṃ pakṣaṃ divasaṃ karaṇamadhikaraṇamṛṇaṃ vedakāvedakayoḥ

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kṛtasamarthāvasthayordeśagrāmajātigotranāmakarmāṇi cābhilikhya vādiprativādipraśnānarthānupūrvyā niveśayet।

niviṣṭāṃścāvekṣeta। na cābhiyukte'bhiyogo'sti।[19]

With regard to the clerical staff *Bṛhaspatismṛti* says that:

The persons who are well versed in words and vocabulary, clever in calculation, bear good conduct, and know various scripts only have to be appointed as accountants and clerks. It is bailiff's duty to summon and to protect the witnesses, the plaintiff and the defendant. King should appoint bailiff, a genuine man, who is subservient to the judges and veracious.[20]

शब्दाभिधानतत्त्वज्ञौ गणनाकुशलौ शुची।
ननालिपिज्ञौ कर्तव्यौ राज्ञा गणकलेखकौ।।

अकारणे रक्षणे च साक्ष्यर्थिप्रतिवादिनाम्।
सभ्याधीनः सत्यवादी कर्तव्यस्तु स पुरुषः।।[20]

śabdābhidhānatattvajñau gaṇanākuśalau śucī।
nanālipijñau kartavyau rājñā gaṇakalekhakau।।

akāraṇe rakṣaṇe ca sākṣyarthipativādinām।
sabhyādhīnaḥ satyavādī kartavyastu sa puruṣaḥ।।[20]

Bṛhaspati describes the duties of these employees in detail:

The duty of the accountant is to make calculations regarding the suit claims, and the duty of the scribe is to record the proceedings of the court which include the plaint, written statement, amendments if any, reply, the depositions of witnesses and the judgment of the court. It is the responsibility of Bailiff to enforce the attendance of the defendant, the assessors and witnesses. The smṛtis furnish the basis for passing

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a decree. Gold and fire are for purposes of administering oath and the water is meant for the litigant public if they felt thirsty during the course of trial. [21]

नृपोऽधिकृत सभ्याश्च स्मृतिर्गणकलेखकौ।
हेमाग्न्यम्बुस्वपुरुषाः साधनाङ्गानि वै दश।।

दशानामपि चैतेषां कर्म प्रोक्तं पृथक् पृथक्।
वक्ताऽध्यक्षो नृपः शास्ता सभ्यः कार्यपरीक्षकः।।

स्मृतिर्विनिर्णयं ब्रूते जयदानं दमं तथा।
शपथार्थे हिरण्याग्नी अम्बु तृषितजन्तुषु।।

गणको गणयेदर्थं लिखेन्यायं च लेखकः।
प्रत्यर्थि सभ्यानयनं साक्षिणं च स्वपूरुषः।। [21]

nṛpo'dhikṛta sabhyāśca smṛtirgaṇakalekhakau।
hemāgnyambusvapuruṣāḥ sādhanāṅgāni vai daśa।।

daśānāmapi caiteṣāṃ karma proktaṃ pṛthak pṛthak।
vaktā'dhyakṣo nṛpaḥ śāstā sabhyaḥ kāryaparīkṣakaḥ।।

smṛtirvinirṇayaṃ brūte jayadānaṃ damaṃ tathā।
śapathārthe hiraṇyāgnī ambu tṛṣitajantuṣu।।

gaṇako gaṇayedarthaṃ likhenyāyaṃ ca lekhakaḥ।
pratyarthi sabhyānayanaṃ sākṣiṇaṃ ca svapūruṣaḥ।। [21]

Lawers: A party to litigation could appoint another person, well versed in law, to represent his case before the court. Such a person was called a Niyogi. It is stated in *Dharmakośa* that:

If one deputed by the claimant, or a person chosen as his representative by the defendant, speaks for his client in the court, the victory or defeat concerns the party himself, and not of the representative.[22]

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अर्थिना सांनियुक्तो वा प्रत्यर्थिप्रहितोऽपि वा।
यो यस्यार्थे विवादते तयोर्जयपराजयोः।। [22]

arthinā saṃniyukto vā pratyarthiprahito'pi vā।
yo yasyārthe vivādate tayorjayaparājayoḥ।। [22]

Such agents have to be appointed by the plaintiff and defendant because they do not know the legal procedure or who are busy with other affairs, or who are not good speakers.

In *Śukranīti* it is stated that:

Only a person well versed in the substantive law and procedural law is entitled to represent parties in a court, and take remuneration for his services. A person is liable to be punished if he, without knowing the law, accepted to represent a party in a case. The lawyer's fees is one-sixteenth of the interests involved i.e., the value defended or realized.[23]

धर्मज्ञो व्यवहारज्ञो नियोक्तव्योऽन्यथा न हि।
अन्यथा भृतिगृह्णन्तं दण्डयेच्च नियोगिनम्।
नियोगितस्यापि भृतिं विवादात् षोडशांशिकीम्। [23]

dharmajño vyavahārajño niyoktavyo'nyathā na hi।
anyathā bhṛtigṛhṇantaṃ daṇḍayecca niyoginam।
niyogitasyāpi bhṛtiṃ vivādāt ṣoḍaśāṃśikīm। [23]

These provisions correspond to Order III of the C.P.C. viz., providing for being represented through a recognized agent viz., power of attorney holder; and providing for appointment of pleaders. It is further stated that:

Having appeared for a party if the Niyogi acted otherwise to the prejudice of his client owing to greed, he was liable to be punished.[24]

लोभेन त्वन्यथा कुर्वन् नियोगी दण्डमर्हति। [24]

lobhena tvanyathā kurvan niyogī daṇḍamarhati। [24]

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Bṛhaspatismṛti further elaborates, in this regard, by saying that:

Even a person who has not been deputed may speak first or last for the timid, the senseless, for madmen, elderly people, women, children and diseased persons.[25]

अप्रगल्भजडोन्मत्तवृद्धस्त्रीबालरोगिणां।
पूर्वोत्तरं वदेत्बन्धुर्नियुक्तो न्यो ऽथवा नरः।।[25]

apragalbhajaḍonmattavṛddhastrībālarogiṇāṃ।
pūrvottaraṃ vadetbandhurniyukto nyo 'thavā naraḥ।।[25]

These provisions indicate that the ancient law givers had realized and recognized the necessity and the right of the parties to litigation to be represented by another person knowing the law. Only a person qualified in the Dharmaśāstrās, i.e., the eighteen titles of law, and other miscellaneous provisions which regulated the rights and liabilities of parties as also the procedural law, had the right to appear as a Niyogi viz., advocate or pleader. These provisions correspond to the Advocate's Act which entitles only advocates qualified in substantive and procedural law and duly enrolled to appear before any court, and plead for parties to a dispute. It also provides for the punishment of advocates by the Bar Council for professional misconduct.

It is for the judges to ensure that the judicial procedures are properly followed. The important role of the judges and assessors in the administration of justice is examined in the next chapter.

End Notes

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2 *Bṛhaspatismṛti.* Ed. Aiyangar, K.V. Rangaswami. (Baroda, Gaikwad's Oriental Series, 1941) I-57, 58

In-45-478&109. Public Domain. Digitization Muthulakshmi Research Academy

3 Ibid., I-46-47

4 Ibid., I, 86-90

5 Ibid., I, -61

6 *Yājñavalkyasmṛti (Mitākṣarānusari)* Ed. Mahama-hopadhyaya Dr. Pullela Sriramachandrudu. (Nandanam, Hyderabad. 2003) YS. II-30

7 *Bṛhaspatismṛti.* Ed. Aiyangar, K.V. Rangaswami. (Baroda, Gaikwad's Oriental Series, 1941) 1-75

8 Devana Bhatta. *Smṛti Chandrika,* Vol.III. (Bombay. Govt Oriental Library Series, 1914&1916) (Sm.Ch.p.40)

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12 *Yājñavalkyasmṛti (Mitākṣarānusari)* Commentator: Pandita Durgadhar jha. (Delhi. Bhāratiya vidya prakasan, 2002) p.87

13 *Nāradīya Manu Saṃhitā with Bhavaswamy commentary.* Ed.: K. Sambasiva Sastri. (Trivendrum. Trivendrum Sanskrit Series No.XCVII, 1904) 1.5

14 *Fourteenth Report of First Law Commission.* p.28

15 *The Śukranīti.* Ed. DR. Krishnalal. Revised and Edited by Kanhaiyalal Joshi.(Delhi. J.P. Publishing House, 2004.)IV. 5-23, 24

16 A.S. Altekar. *State and Government in Ancient India.* Delhi. Motilal Banarsidass publishers pvt.ltd, 1997, p.255

17 *Fourteenth Report of first Law Commisson.* p. 27

18 *The Kauṭilīya Arthaśāstra* Part-1. Editor: R. P. Kangle. (Delhi-7. Motilal Banarsidass, 1986) 4, 9-17)

19 Ibid., 3.1-17, 18, 26

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21 Ibid., 87 to 90

22 *Dharmakośa.* Editor: Laxmanasastry. Wai (Satara Prajna Pathasala Mandala, 1953) P.116

23 *The Śukranīti.* Ed. DR. Krishnalal. Revised and Edited by Kanhaiyalal Joshi. (Delhi. J.P. Publishing House, 2004) IV, 5-114, 115, 112

24 Ibid., IV, 5-116

25 *Bṛhaspatismṛti.* Ed. Aiyangar, K.V. Rangaswami. (Baroda, Gaikwad's Oriental Series, 1941) 1.142

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ii) Judges and Assessors

Judges and Assessors: According to the Smṛtis, one of the most important functions of the king was 'administration of justice' to ensure Justice to all and it is the personal concern of the king. According to *Bṛhaspatismṛti:*

Cases should be examined either by the king or by the chief judge, a twice born, thereby keeping in view the principles of equity and adhering to the opinions of the judges and to the prescriptions of the sacred law.[1]

राजा कार्याणि पश्येत् प्राड्विवाकोऽथवा द्विजः।
न्यायाङ्गान्यग्रतः कृत्वा सभ्यशास्त्रमते स्थितः।।[1]

rājā kāryāṇi paśyet prāḍvivāko'thavā dvijaḥ।
nyāyāṅgānyagrataḥ kṛtvā sabhyaśāstramate sthitaḥ।।[1]

Apart from the chief judge, there should be some sabhyās or assessors in the court of justice. There should be at least three according to Manu, Yājñavalkya, and Nārada. Manu says that;

If the king does not dispose the cases personally he should appoint a learned brāhmaṇa to do it. That brāhmaṇa assisted by three other learnded Brahman courtiers sitting or even standing in the court itself should do the job.[2]

यदा स्वयं न कुर्यात्तु नृपतिः कार्यदर्शनम्।
तदा नियुज्याद्विद्वांसं ब्राह्मणं कार्यदर्शने।।

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सोऽस्य कार्याणि संपश्येत्सभ्यैरेव त्रिभिर्वृतः।
सभामेव प्रविश्याद्यासीनः स्थित एव वा।। [2]

yadā svayaṃ na kuryāttu nṛpatiḥ kāryadarśanam।
tadā niyujyādvidvāṃsaṃ brāhmaṇaṃ kāryadarśane।।
so'sya kāryāṇi saṃpaśyetsabhyaireva tribhirvṛtaḥ।
sabhāmeva praviśyādyāsīnaḥ sthita eva vā।। [2]

According to Yājñavalkya also:

If, under pressure of more important business, the King is unable to try the suits himself, he shall appoint a Judge to try them; with the help of the Assessors and they should be persons fully conversant with the Law.[3]

अपश्यता कार्यवशाद्व्यवहारान्नृपेण तु।
सभ्यैः सह नियोक्तव्यो ब्राह्मणः सर्वधर्मवित्।।
व्यवहारान्नृपः पश्येद्विद्वर्भिर्ब्राह्मणैः सह। [3]

apaśyatā kāryavaśādvyavahārānnṛpeṇa tu।
sabhyaiḥ saha niyoktavyo brāhmaṇaḥ sarvadharmavit।।
vyavahārānnṛpaḥ paśyedvidvarbhirbrāhmaṇaiḥ saha। [3]

Like the chief judge, these sabhyās should be learned brāhmaṇas; when brāhmaṇas are not available, the king can employ others who are proficient in Vedās. According to Nārada as mentioned in *Dharmakośa:*

The sabhyās should be honourable men of tried integrity who are competent to discharge the duties. The study of Dharmaśāstrās were usually cultivated in the brāhmanical circles, and a deep knowledge of the sacred law was necessary for the proper discharge of the duties and functions of the juror.[4]

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राजा तु धार्मिकान् सभ्यान् नियुञ्ज्यात् सुपरीक्षितान्।
व्यवहारधुरं वोढुं ये शक्ताः सद्भवा इव।।

धर्मशास्त्रार्थकुशलाः कुलीनाः सत्यवादिनः।
समाः शत्रौ च मित्रे च नृपतेः स्युः सभासदः।।[4]

rājā tu dhārmikān sabhyān niyuñjyāt suparīkṣitān।
vyavahāradhuraṃ voḍhuṃ ye śaktāḥ sadbhavā iva।।

dharmaśāstrārthakuśalāḥ kulīnāḥ satyavādinaḥ।
samāḥ śatrau ca mitre ca nṛpateḥ syuḥ sabhāsadaḥ।।[4]

The smṛtis are almost unanimous in stating that the sabhyās or jurors should be *brāhmaṇas*. This must be the reason for the usual view of the Smṛtis that the *brāhmaṇas* should be sabhyās.

The most interesting feature of the judicial administration was the system of jury. Even the king and the chief justice could not begin the trial of a case, if they were not assisted by a panel of jurors. It is said in *Śukranīti* that:

The assembly in which there are seven, five or even three brāhmaṇas versed in human affairs, the Vedās and Dharmaśāstrās is august and solemn like one on the occasion of Sacrifice.[5]

लोकवेदज्ञधर्मज्ञाः सप्त पंच त्रयोपि वा।
यत्रोपविष्टा विप्राः स्युः यज्ञसदृशी सभा।।[5]

lokavedajñadharmajñāḥ sapta paṃca trayopi vā।
yatropaviṣṭā viprāḥ syuḥ yajñasadṛśī sabhā।।[5]

The number of jurors was deliberately kept uneven to provide for the contingency of a difference of opinion. The jurors were to be not only impartial, but also well grounded in the law. Yājñavalya says that:

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The king should appoint, as his courtiers, persons possessed of Vedic knowledge, conversant with the laws of morality, truthful and impartial towards friends and foes.[6]

श्रुताध्ययनसंपन्ना धर्मज्ञाः सत्यवादिनः।
राज्ञा सभासदः कार्या रिपौ मित्र च ये समाः।। [6]

śrutādhyayanasaṃpannā dharmajñāḥ satyavādinaḥ।
rājñā sabhāsadaḥ kāryā ripau mitra ca ye samāḥ।।[6]

They were to be fearless exponents of what they believed to be the correct legal position. A juror keeping silence knowing that something is going wrong is to be condemned. The jurors have to express their opinion, even if it was in opposition to that of the King; it was their duty to restrain a willful king going astray and giving a wrong decision. In *Śukranīti it is said that:*

The councilors must not be indifferent to the immoral methods of procedure adopted by the King, for then they are thrown down hell ward together with the King.[7]

अधर्मतः प्रवृत्तं तं नोपेक्षरन्सभासदः।
उपेक्षमाणाः सनृपा नरकं यान्त्यधोमुखाः।।[7]

adharmataḥ pravṛttaṃ taṃ nopekṣaransabhāsadaḥ।
upekṣamāṇāḥ sanṛpā narakaṃ yāntyadhomukhāḥ।।[7]

In this regard Bṛhaspati says that:

The Sabhyās who give unjust decision and take bribes should be punished by banishment and forfeiture of all property.[8]

अन्यायवादिनः सभ्यास्तथैवोत्कोचजीविनः।
विश्वस्ते वंचकाश्चैव निर्वास्याः सर्व एव ते।।[8]

anyāyavādinaḥ sabhyāstathaivotkocajīvinaḥ।
viśvaste vaṃcakāścaiva nirvāsyāḥ sarva eva te।।[8]

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A number of famous jurists maintain that the king or presiding judge is to be guided by the verdict of the jury. The king should give to the victorious party the Jayapatra after it has been carefully analyzed by the officers and accepted by the other party. The only exception was that of a difficult case, where the jurors could not come to any definite decision. In such a case the King exercised his privilege of deciding the point according to his own view. In *Śukranīti* it is said that:

In cases which are impossible to decide finally and which are of a doubtful character, e.g., those relating to boundaries, etc., the King as the supreme lord is at liberty to proceed as is best.[9]

सभ्यादिनिभिर्विनिर्णिक्तं विधृतं प्रतिवादिना।
दृष्ट्वा राजा तु जयिने प्रदद्याज्जयपत्रकम्।।

निश्चेतुं ये न शक्याः स्युः वादाः संदिग्धरूपिणः।
सीमाद्यास्तत्र नृपतिः प्रमाणं स्यात् प्रभुर्यतः।। [9]

sabhyādinibhirvinirṇiktaṃ vidhṛtaṃ prativādinā।
dṛṣṭvā rājā tu jayine pradadyājjayapatrakam।।

niścetuṃ ye na śakyāḥ syuḥ vādāḥ saṃdigdharūpiṇaḥ।
sīmādyāstatra nṛpatiḥ pramāṇaṃ syāt prabhuryataḥ।।[9]

Kātyāyana holds that the authority to decide suits lies with judges and sabhyās. Bṛhaspati says that:

The chief judge and assessors should not hold a conversation in private while the case is undecided; if they do so they should be punished.[10]

अनिर्णीतेषु यद्येवं सम्भाषेत रहोर्थिना।
प्राड्विवाकोऽपि दण्ड्यः स्यात्सभ्याश्चैव विशेषतः।।[10]

anirṇīteṣu yadyevaṃ sambhāṣeta rahorthinā।
prāḍvivāko'pi daṇḍyaḥ syātsabhyāścaiva viśeṣataḥ।।[10]

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The chief justice: The chief judge should try cases according to the principles of equity and the doctrine of the sacred law and abiding by the opinion of judges. Even when the King is trying the suits himself, he shall have the Judge there to advise him. In this case, however, the functions of the Judge are purely advisory. Kātyāyana as mentioned in *Vyavahāracintāmaṇi* refers to the character of such judge (prāḍvivāka) and describes him as under:

The Judge shall be restrained, of good family, impartial, who does not cause, emotional upsurge, steadfast, who thinks about with great fear or anxiety, who lives according to the sacred law, who is assiduous, and free from anger.[11]

दान्तं कुलीनं मध्यस्थमनुद्वेगकरं स्थिरम्।
परत्रं भीरुं धर्मिष्ठमुद्युक्तं क्रोधवर्जितम्।।[11]

dāntaṃ kulīnaṃ madhyasthamanudvegakaraṃ sthiram।
paratraṃ bhīruṃ dharmiṣṭhamudyuktaṃ
krodhavarjitam।।[11]

According to *Bṛhaspatismṛti:*

A judge is called prāḍvivāka because in a law suit he puts question and counter question; he speaks first in a friendly way.[12]

विवादे पृच्छति प्रश्नं प्रतिप्रश्नं तथैव च।
प्रियपूर्वं प्राग्वदति प्राड्विवाकस्ततः।।[12]

vivāde pṛcchati praśnaṃ pratipraśnaṃ tathaiva ca।
priyapūrvaṃ prāgvadati prāḍvivākastataḥ।।[12]

This, however, is only the etymological explanation of the term Nārada , whereas the main quality of the chief judge is his actual capability of conducting legal procedures. The role of *prāḍvivāka* is more important in Judicial System, therefore Nārada says *as per Dharmakośa:*

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The chief Judge should be learned and fully acquainted with the eighteen titles of law; and its eight thousand, divisions, he should know the science of logic and other branches of science and knower of smṛti and śruti. At the same time, the chief Judge, should have knowledge of local and traditional usages, and customs. The etymology of "prāḍvivāka" means "investigates the law" related to the case in hand by putting questions (Prat) and passing a discussion (Vivecayati) according to what was heard or understood by him.[13]

अष्टादशपदाभिज्ञः तद्भेदाष्टसहस्रवित्।
अन्वीक्षक्यादि कुशलः श्रुतिस्मृति परायणः।।

विवादसंश्रुतं धर्मं पृच्चसि प्रत् शृतं मतम्।
विवेचयति यस्तस्मात्प्राड्विवाकस्तु स स्मृतः।।[13]

aṣṭādaśapadābhijñaḥ tadbhedāṣṭasahasravit।
anvīkṣakyādi kuśalaḥ śrutismṛti parāyaṇaḥ।।

vivādasaṃśrutaṃ dharmaṃ pṛccasi prat śṛtaṃ matam।
vivecayati yastasmātprāḍvivākastu sa smṛtaḥ।।[13]

The etymology of the word prāḍvivāka itself shows that the major responsibility of investigating a case was upon the chief judge, though there were 'sabhāsadās'or other members to help. Grāmin position mentioned in the **ṛgveda** over a period of time must have evolved into a position to assist the King in dealing with the legal matters. Thereafter, it seems, the same position came to be designated as prāḍvivāka.

In rājadharma, the King is advised to appoint suitable judges, indicating there in the qualities of a person to be a judge. In *Mahābhārat* it is observed that:

A *person who is well versed in laws, regulating judicial proceedings ,and dharma, a Profound scholar, well versed in the law*

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of evidence, law abiding, and has fully studied the Vedās and logic should be appointed to carry on the administration of justice.[14]

व्यवहारेषु धर्मेषु योक्तव्याश्च बहुश्रुताः।
प्रमाणज्ञा महीपाल न्यायशास्त्रावलम्बिनः।।

वेदार्थतत्वविद् राजन् तर्कशास्त्रबहुश्रुताः।
मन्त्रे च व्यवहारे च नियोक्तव्या विजानता।। [14]

vyavahāreṣu dharmeṣu yoktavyāśca bahuśrutāḥ।
pramāṇajñā mahīpāla nyāyaśāstrāvalambinaḥ।।

vedārthatatvavid rājan tarkaśāstrabahuśrutāḥ।
mantre ca vyavahāre ca niyoktavyā vijānatā।। [14]

Where, however, the knowledge of the sacred law was not necessary, as when the case concerned the disputes among the cultivators, merchants and foresters, Dharmaśāstrās' writers themselves recommended that the cases should be tried with the help of the jurors selected from the castes or the professions of the parties themselves. Otherwise a proper decision would be almost impossible. *nāradīyamanu Saṃhitā* as mentioned in *Vyavahāracintāmaṇi* says that:

In the case of merchants, artisans farmers, and stage-players, a decision is not possible unless those persons who themselves know the nature of these trades should be allowed to take charge.[15]

वणिक् शिल्पिप्रभृतिषु कृषिरंगोपजीविषु।
अशक्यो निर्णयो ह्यन्यैस्तत्वज्ञैरेव तु कारयेत्। [15]

vaṇik śilpiprabhṛtiṣu kṛṣiraṃgopajīviṣu।
aśakyo nirṇayo hyanyaistatvajñaireva tu kārayet। [15]

According to *The Kauṭilīya Arthaśāstra* the fact that a judge is called a 'dharmastha' upholder of dharma indicates that the

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ultimate source of all law is dharma. So long as every one follows his svadharma having due regard to his varna and ashrama and the king follows his rājadharma, social order will be maintained. Kautilya, however, recognizes that the customary law of the people of a region or a group is also relevant. In addition, there is law as promulgated by the king. He further says that:

When all traditional codes of conduct cease to operate due to disuse or disobedience, the King can promulgate written laws through his edicts, because he alone is the guardian of the right conduct of this world'.[16]

चातुर्वर्णाश्रमस्य लोकस्याचाररक्षणात्।
नस्यतां सर्वधर्माणां राजा धर्मप्रवर्तकः।।[16]

cāturvarṇāśramasya lokasyācārarakṣaṇāt।
nasyatāṃ sarvadharmāṇāṃ rājā dharmapravartakaḥ।।[16]

With regard to the Judges and Magistrates it is stated that:

There shall be established a bench of three judges who shall hold court at frontier posts, sub-district headquarters, and provincial headquarters as necessary. The judges shall be learned in dharma and have the qualifications of a minister. They shall judge civil cases arising from disputes between two parties.[17]

धर्मस्थास्त्रयस्त्रयोऽमात्या जनपदसंधिसंग्रहणद्रोणमुखस्थानीयेषु
व्यावहारिकानर्थान् कुर्युः[17]

dharmasthāstrayastrayo'mātyājanapadasaṃdhisaṃgrahaṇadroṇamukhasthānīyeṣu vyāvahārikānarthān kuryuḥ.[17]

He further observes that:

The *Judges shall discharge their duties objectively and impartially so that they may earn the trust and affection of the people.*[18]

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एवं कार्याणि धर्मस्थाः कुर्युरच्छलदर्शिनः।
समाः सर्वेषु भावेषु विश्वास्या लोकसंप्रियाः।।[18]

Evaṃ kāryāṇi dharmasthāḥ kuryuracchaladarśinaḥ।
samāḥ sarveṣu bhāveṣu viśvāsyā lokasaṃpriyāḥ।।[18]

Kautilya describes judges and magistrates. Magistrates were another class of judicial officers. The distinction between judges and magistrates seems to be that, while the former dealt with all cases concerning transactions between two parties, the latter were concerned with crimes against society in general. Both are endowed with judicial functions. In the case of magistrates they used to discharge the functions of executive and judicial. About the dual role of the magistrates he says:

Wherever there is a Record keeper or a Provincial Governor who is responsible for revenue collection, magistrates shall be posted to inspect their work and to ensure proper collection of taxes, particularly the Special Emergency Dues.[19]

गोपस्थानिकस्थानेषु प्रदेष्टारः कार्यकरणं बलिप्रग्रहं च कुर्युः।[19]

gopasthānikasthāneṣu pradeṣṭāraḥ kāryakaraṇaṃ
balipragrahaṃ ca kuryuḥ।[19]

It may be noted here that presently also the District collectors or tahasildārs exercise magistrate powers and supervise collection of revenue taxes among other duties.

Conduct rules framed for the judges: Kautilya observes that a judge is called a 'dharmastha'- upholder of dharma which implies that the ultimate source of all law is dharma. Exemplified character is expected from them. They should behave themselves beyond any suspicion. Accountability on the part of judges is made very strict so that they would be doubly careful in awarding decrees so that a genuine person is not put to loss. It is relevant in this regard to refer to the observations made in *Śukranīti* viz., :

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There are five causes which give rise to the charge of partiality against the judge. They are affection in favour of a party; greed; fear; ill-will against a party; and the judge meeting and hearing a party to a case secretly.[20]

पक्षपाताधिरोपस्य कारणानि च पञ्च वै।
रागलोभभयद्वेषा वादिनोश्च रहश्श्रुतिः।।[20]

pakṣapātādhiropasya kāraṇāni ca pañca vai।
rāgalobhabhayadveṣā vādinośca rahaśśrutiḥ।।[20]

In *kātyāyanasmṛti* as mentioned in *Vyavahāracintāmaṇi*, it is said that:

If the judge knows how a case should be decided correctly, he should speak accordingly; he should not speak otherwise. By doing so he would incur a double punishment. If anything has been lost through the error of a judge, he should restore it in the same form; if, however, a case of litigants has been decided in this way, it should be investigated again.[21]

कार्यस्य निर्णयं सम्यक् ज्ञात्वा सभ्यस्तथा वदेत्।
अन्यथा नैव वक्तव्यं वक्ता द्विगुणदण्डभाक्।।

सभ्यदोषात्तु यन्नष्टं देयं सभ्येन तत्तथा।
कार्यं तु कार्यिणामेवं निश्चितं तु विचारयेत्।।[21]

kāryasya nirṇayaṃ samyak jñātvā sabhyās tathā vadet।
anyathā naiva vaktavyaṃ vaktā dviguṇadaṇḍabhāk।।

sabhyadoṣāttu yannaṣṭaṃ deyaṃ sabhyena tattathā।
kāryaṃ tu kāryiṇāmevaṃ niścitaṃ tu vicārayet।।[21]

It is stated in *Bṛhaspatismṛti* that:

Judges should be banished if they utter injustice, if they live on bribery and if they betray other people's confidence. A false judge, a

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false witness, and the murderer of a brāhmaṇa are said to be equally deep in guilt. Equally so, however, (the prāḍvivāka or a judge) who privately converses with a party before the case has been decided. [22]

अन्यायवादिनः सभ्यास्तथैवोत्कोचजीविनः।
विश्वस्ते वंचकाश्चैव निर्वास्याः सर्व एव ते।।

कूटसभ्यः कूटसाक्षी ब्रह्महा च सभाः स्मृताः।
अनिर्णीते तु यद्यर्थे सम्भाषते रहोऽर्थिना।। [22]

anyāyavādinaḥ sabhyāstathaivotkocajīvinaḥ।
viśvaste vaṃcakāścaiva nirvāsyāḥ sarva eva te।।

kūṭasabhyaḥ kūṭasākṣī brahmahā ca sabhāḥ smṛtāḥ।
anirṇīte tu yadyarthe sambhāṣate raho'rthinā।। [22]

It is stated in *The Kauṭilīya Arthaśāstra (part II)* that:

If the judge threatens, upbraids, drives away or browbeats a litigant, he shall impose the lowest fine for violence on him; double that in case of verbal injury. If he does not question one who ought to be questioned, questions one who ought not to be questioned, or after questioning dismisses (the statement), or instructs, reminds or prompts him, he shall impose the middle fine for violence on him. If he does not ask for evidence which ought to be submitted, asks for evidence that ought not to be submitted, proceeds with the case without evidence, dismisses it under a pretext, carries away one tired with delays, throws out of context a statement which is in proper order, gives to witnesses to help in their statements (or) takes up once again a case which is completed and in which judgemenst is pronounced, he shall impose the heigest fine for violence on him. (All these are punishable offences) In case the offence is repeated, the judge shall be fined double and removed from office.[23]

धर्मस्थश्चेद्विवदमानं पुरुषं तर्जयति भर्त्सयत्यपसारयत्यभिग्रसते वा पूर्वमस्मै साहसदण्डं कुर्यात् , वाक्पारुष्ये द्विगुणम्। पृच्छ्यं न पृच्छ्यति, अपृच्छ्यं

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पृच्छ्यति, पृष्ट्वा वा विसृजति, शिक्ष्यति, स्मारयति, पूर्वं ददाति वा, इति मध्यमस्मै साहसदण्डं कुर्यात्। देयं देशं न पृच्छति, अदेयं देशं पृच्छति, कार्यमदेशेनातिवाहयति, च्छलेनातिहरति, कालहरणेन श्रान्तमपवाह मार्गापन्नं वाक्यमुत्क्रमयति, मतिसाहाय्यं साक्षिभ्यो ददाति, तारितानुशिष्टं कार्यं पुनरपि गृह्णाति, उत्तममस्मै साहसदण्डं कुर्यात्। पुनरपराधे द्विगुणं स्थानाद्व्यवरोपणं च।[23]

dharmasthaścedvivadamānaṃ puruṣaṃ tarjayati

bhartsayatyapasārayatyabhigrasate vā pūrvamasmai sāhasadaṇḍaṃ

kuryāt, vākpāruṣye dviguṇam। pṛcchyaṃ na pṛcchyati, apṛcchyaṃ

pṛcchyati, pṛṣṭvā vā visṛjati, śikṣyati, smārayati, pūrvaṃ dadāti vā, iti

madhyamasmai sāhasadaṇḍaṃ kuryāt। deyaṃ deśaṃ na pṛcchati,

adeyaṃ deśaṃ pṛcchati, kāryamadeśenātivāhayati, chalenātiharati,

kālaharaṇena śrāntamapavāhayati, mārgāpannaṃ ākyamutkramayati, matisāhāyyaṃ sākṣibhyo dadāti, tāritānuśiṣṭaṃ kāryaṃ punarapi gṛhṇāti, uttamamasmai sāhasadaṇḍaṃ kuryāt। punaraparādhe dviguṇaṃ sthānādvyavaropaṇaṃ ca।[23]

Kautilya prescribes certain guidelines to the Judges. He says that:

What was badly heard or badly written through the folly of the plaintiff, or the affidavit of a person (since) deceased, shall, after investigation, be decided only on the testimony of witnesses.[24]

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बालिश्यादभियोक्तुर्वा दुःश्रुतं दुर्लिखितं प्रेताभिनिवेशं वा समीक्ष्य साक्षिप्रत्ययमेव स्यात्। [24]

bāliśyādabhiyokturvā duḥśrutaṃ durlikhitaṃ pretābhiniveśaṃ vā samīkṣya sākṣipratyayameva syāt।[24]

The educational attainments and personal traits of a person to be appointed as a judge, specifically provided for, shows the importance attached to that position and how one was expected to conduct oneself as a judge. All the Dharmaśāstrās with one voice lay down that dispensation of justice was the highest dharma of judges. It is stated in *Manusmṛti* that:

"In a case where Dharma (justice) has been injured or made to suffer at the hands of Adharma (injustice) and still the judges fail to remove the injustice, such judges are sure to suffer for their act or omission which is adharma. Where Dharma (justice) is sought to be destroyed by Adharma (injustice), and truth is sought to be destroyed by untruth, and the judges fail to prevent the same but remain mere spectators, they are sure to be destroyed" [25]

धर्मो विद्धस्त्वधर्मेण सभां यत्रोपतिष्ठते।
शल्यं चास्य न कृन्तन्ति विद्धास्तत्र सभासदः।।

यत्र धर्मो ह्यधर्मेण सत्यं यत्रानृतेन च।
हन्यते प्रेक्षमाणानां हतास्तत्र सभासदः।।[25]

dharmo viddhastvadharmeṇa sabhāṃ yatropatiṣṭhate।
śalyaṃ cāsya na kṛntanti viddhāstatra sabhāsadaḥ।।

yatra dharmo hyadharmeṇa satyaṃ yatrānṛtena ca।
hanyate prekṣamāṇānāṃ hatāstatra sabhāsadaḥ।।[25]

Among the early Sanskrit dramatic compositions the *Mṛchchakaṭikam* of Sūdraka datable to 8th century occupies a very high and distinguished position. The play has drawn a realistic

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picture of the society of that time. The *Mṛichchakaṭikam* is a great example to cite for interference of the administration in Judiciary". In this play Sūdraka mentioned about the qualities of prāḍvivāka as under:

A judge should be learned in Law; expert in tracing the course of fraud, eloquent; never losing his temper; equally impartial towards friends, strangers and relatives giving his decision only after carefully investigating the facts; a protector of the weak; a terror to the rogues; righteous; free from greed even when the means exist for him to take bribes, sincerely bent in his mind on discovering the real truth, and able to avert the anger of the king[26]

In fact these are the qualities required to be possessed of a Judge in the present context also. Before taking up the case, the judges have to classify subject matter of the dispute under one of the eighteen topics the details of which are discussed in the next chapter 'topics of law'.

End Notes

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iii) Topics of Law

Kātyāyanasmṛti as mentioned in *smṛticandrika,* explains etymologically the word vyavahāra (Legal Proceedings) as under:

Vi means 'various', ava means 'doubts', hara means 'removing-so vyavahāra *means, 'removing of various doubts' and the legal proceedings in a court of law between two parties in which the violation of Dharma is established by effort.*[1]

वि नानार्थे अव सन्देहे हरणं हार उच्यते।
नानासन्देह हरणाद् व्यवहार इति स्मृतः।।

प्रयत्नसाध्ये विच्छिन्ने धर्माख्ये न्यायविस्तरे।
साध्यमूलस्तु यो वादो व्यवहारः स उच्यते।।[1]

vi nānārthe ava sandehe haraṇaṃ hāra ucyate।
nānāsandeha haraṇād vyavahāra iti smṛtaḥ।।

prayatnasādhye vicchinne dharmākhye nyāyavistare।
sādhyamūlastu yo vādo vyavahāraḥ sa ucyate।।[1]

The Dharmasūtrās, the *Arthaśāstra* of Kautilya and the Dharmaśāstrās, reveal a state of the society in which the Hindu Law was highly developed both in its civil and criminal sides including their substantive as well as adjective aspects. The titles of law are termed as "vyavahāra pādas". Yājñavalkya explains that:

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On account of transgressing the law and the established usage by the enemies and got oppressed by them when a person applies to the King; it will form the subject matter of law suit.[2]

स्मृत्याचारव्यपेतेन मार्गेणाऽऽधर्षितः परैः।
आवेदयति चेद्राज्ञे व्यवहारपदं हि तत्।।[2]

smṛtyācāravyapetena mārgeṇā''dharṣitaḥ paraiḥ।
āvedayati cedrājñe vyavahārapadaṃ hi tat।।[2]

Yājñavalkya mentions civil suits as artha vivada whereas Bṛhaspati and Kātyāyana state that: *The law suits originate in disputes over wealth or injuries.*[3]

धर्मप्रधानाः पुरुषाः पूर्वमासन्नहिंसकाः
लोभद्वेषाभिभूतानां व्यवहारः प्रवर्तितः।।[3]

dharmapradhānāḥ puruṣāḥ pūrvamāsannahiṃsakāḥ
lobhadveṣābhibhūtānāṃ vyavahāraḥ pravartitaḥ।।[3]

Classification of topics into civil and criminal: In the case of civil topics the cause of action arises on account of breach of the terms of a contract entered into by the parties whereas in the case of criminal topic the cause of action arises on account of an injury caused to one by another individual intentionally to do so which act is in violation of any established public criminal law. In the case of civil wrong the aggrieved party has to lodge a complaint to the concerned authorities whereas in the case of crime it is the duty of the State to initiate action on its own or on receiving information from anywhere including the aggrieved. The aggrieved may be compensated by providing pecuniary relief if he could establish that the breach of the contract was caused by the other. With regard to the criminal offence the accused, if found guilty, would be sentenced as per the relevant provisions of penal law.

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The eighteen topics of law dealt by Manu are adopted in almost all the major Smṛtis, with an important modification of making distinction between civil and criminal law. Later smṛtikaras divided these 18 topics into two branches.

Bṛhaspati observes that there are two branches of vyavahāra :

One arising out of wealth and another out of violence. Fourteen of them arise out of wealth and four out of violence.[4]

द्विपदो व्यवहारः स्यात् धनहिंसासमुद्भवः।
द्विसप्तकोऽर्थमूलस्तु हिंसामूलश्चतुर्विधः।।[4]

dvipado vyavahāraḥ syāt dhanahiṃsāsamudbhavaḥ।
dvisaptako'rthamūlastu hiṃsāmūlaścaturvidhaḥ।।[4]

With regard to these two branches the procedures adopted and the relative remedies provided also differ. In the case of disputes relating to debt etc., pecuniary relief is provided for. In the case of the topics relating to sāhasa and other offences, punishment is prescribed. For the state to initiate action against the offenders under criminal law there appears to be an arrangement to get information in relation to the offences. Rama jois, in his book *'Seeds of Modern Public Law in Ancient Indian Jurisprudence'* refers to the definition of Stobaka and *Sūcaka* as given by Kātyāyana:

A person on his own accord detects commission of offences and reports to the king and gets remuneration from the king for giving such first information is called Stobakah. And a person who is appointed by the king to detect commission of offences and provide such information to him is called a Sūcaka.[5]

शास्त्रेण निन्दितं त्वर्थमुख्यो राज्ञा प्रचोदितः।
आवेदयति यः पूर्वं स्तोबकः स उदाहृतः।।

नृपेणैव नियुक्तो यः परदोषमवेक्षितुम्।
नृपस्य सूचयेज्ज्ञात्वा सूचकः स उदाहृतः।।[5]

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śāstreṇa ninditaṃ tvarthamukhyo rājñā pracoditaḥ।
āvedayati yaḥ pūrvaṃ stobakaḥ sa udāhṛtaḥ।।

nṛpeṇaiva niyukto yaḥ paradoṣamavekṣitum।
nṛpasya sūcayejjñātvā sūcakaḥ sa udāhṛtaḥ।।[5]

It clearly establishes that the complaint in relation to a crime can be received from anybody and not necessarily from the person injured or his relatives. And the person who provides first information about a crime is entitled for remuneration from the King. These two factors contribute abundantly for the state to handle the crime in the society. In fact this corresponds to First information Report under Criminal Procedure Code.

Classification of eighteen topics: From very ancient times the disputes or laws have been arranged under eighteen topics. The eighteen topics of Vyavhara as stated in *Manusmṛti* are:

(ṛṇadānam; nikṣepaḥ; asvāmivikrayaḥ;
sambhūyasamutthānam; dattāsyanapakarma;
vetanadānam; samvidyatikramaḥ; krayavikrayānusāya;
svāmipālavivādaḥ; sīmāvivādaḥ; vākpāruṣyam;
daṇḍapāruṣyam; steyam; sāhasam; strīsaṃgrahaṇam;
strīpuṃdharmaḥ; vibhāgaḥ; dyūtasamahvāya.[6])

Payment of debts; Deposits.; Sale without ownership; Joint undertakings; Resumption of gift; Payment of wages; Violation of convention of guilds and coprporations; Sale and purchase; Dispute between master and servant; Boundary dispute; Defamation; Assault; Theft; Offence by violence; Adultery; Duties of husband and wife.; Partition; Betting and gambling.[6]

तेषामाद्यमृणादानं निक्षेपो अस्वामिविक्रयः।
सम्भूय च समुत्थानं दत्तस्यानपकर्म च।।

वेतनस्यैव चादानं संविदश्च व्यतिक्रमः।
क्रयविक्रयानुशयो विवादः स्वामिपालयोः।।

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सीमाविवादधर्मश्च पारुष्य दण्डवाचिके।
स्तेयं च साहसं चैव स्त्रीसंग्रहणमेव च।।

स्त्रीपुंधर्मो विभागश्च द्यूतमाह्वय एव च।
पदान्यष्टादशैतानि व्यवहारस्थितविह।। [6]

teṣāmādyamṛṇādānaṃ nikṣepo asvāmivikrayaḥ।
sambhūya ca samutthānaṃ dattasyānapakarma ca।।

vetanasyaiva cādānaṃ saṃvidaśca vyatikramaḥ।
krayavikrayānuśayo vivādaḥ svāmipālayoḥ।।

sīmāvivādadharmaśca pāruṣye daṇḍavācike।
steyaṃ ca sāhasaṃ caiva strīsaṃgrahaṇameva ca।।

strīpuṃdharmo vibhāgaśca dyūtamāhvaya eva ca।
padānyaṣṭādaśaitāni vyavahārasthitāviha।।[6]

Contract: With regard to the invalid contracts it is stated in *Manusmṛti* that:

If an intoxicated person, a mad, a grief stricken person, a sickly person, a servant, a child and a very aged person entered into any monetary transaction without the consent of the family members; in such case the claim should not be legally entertained. If a promise has been made verbally or in writing but it is against family traditions, law and Dharma, it is never taken to be valid.[7]

मत्तोन्मत्तार्ताध्यधीनैर्बालेन स्थविरेण वा।
असंबद्धकृतश्चैव व्यवहारो न सिद्ध्यति।।

सत्या न भाषा भवति यद्यपि स्यात्प्रतिष्ठिता।
वहिश्चेद्भाष्यते धर्मान्नियताद्व्यावहारिकात्।। [7]

mattonmattārtāṃdhyadhīnairbālena sthavireṇa vā।
asaṃbaddhakṛtaścaiva vyavahāro na siddhyati।।

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satyā na bhāṣā bhavati yadyapi syātpratiṣṭhitā।

vahiścedbhāṣyate dharmānniyatādvyāvahārikāt।।[7]

Yājñavalkyasmṛti also says that:

A contract brought about by force, or fraud, and the like were invalid.[8]

बलोपाधिविनिर्वृत्तान् व्यवहारान्निवर्तयेत्।[8]

balopādhivinirvṛttān vyavahārānnivartayet।[8]

These provisions corresponds to the principles enunciated in section 11 and 14 of the Indian Contract Act.

Payment and Recovery of Debts: Money lending activity is comprehensively covered under this topic. *smṛticandrika* explains the topic 'Payment and Recovery of Debts asunder:

Which debt must be paid, and which may not be paid, by whom, where and in what way to be paid, and the rules governing advancing and recovering of loans constitute the title payment of debts.[9]

ऋणं देयमदेयं च येन यत्र यथा च यत्।

दानग्रहणधर्मश्च ऋणादानमिति स्मृतम्।। [9]

ṛṇaṃ deyamadeyaṃ ca yena yatra yathā ca yat।

dānagrahaṇadharmaśca ṛṇādānamiti smṛtam।।[9]

With regar to the rate of interest to be charged *Manusmṛti* says:

The rate of interest charged should not be more than the stipulated one. If charged more it is termed as Kusida. The proper rate of interest is 5%.[10]

कृतानुसारादधिका व्यतिरिक्ता न सिद्ध्यति।

कुसीदपथमाहुस्तं पञ्चकं शतमर्हति।[10]

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Deposits: nikṣepa or upanidhi means entrustment of moveable property by its owner to another person for gratuitous safe custody. *smṛticandrika defines it as:*

Where a man entrusts any property, chattel of his own with another for safe custody, in confidence and without suspicion, it is called by the learned 'a deposit' a title of law.[11]

स्वद्रव्यं यत्र विस्रम्भान्निक्षिपत्यविशङ्कितः।
निक्षेपो नाम तत्प्रोक्तं व्यवहारपदं बुधैः।।[11]

kṛtānusārādadhikā vyatiriktā na siddhyati।
kusīdapathamāhustaṃ pañcakaṃ śatamarhati।[10]

In this regard *Manusmṛti* says that:

A depository who fails to return the article deposited with him, as also a person who claims back a deposit which he never deposited, should be punished like a thief, or shall be fined and the trusty should be made to repay the entire amount covering the value of the claim.[12]

यो निक्षेपं नार्पयति यश्चानिक्षिप्य याचते।
तावुभौ चौरवच्छास्यौ दाप्यौ वा तत्समं दमम्।।[12]

yo nikṣepaṃ nārpayati yaścānikṣipya yācate।
tāvubhau cauravacchāsyau dāpyau vā tatsamaṃ damam।।[12]

Sale without ownership (asvāmivikrayaḥ): All the essential ingredients of sale of immovable property and sale of goods which are found under the Transfer of Property Act and Sale of Goods Act are covered under this topic. According to Nārada vide *smṛticandrika:*

The wealth in this world is of two kinds-movable and immovable. In the law relating to purchase and sale, both are regarded as saleable property. When a property, held as a deposit, or belonging to another, or lost and found by a stranger, or a stolen article, is sold behind the back of the owner, such a sale is called sale without ownership.[13]

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लोकेऽस्मिन् द्विविधं द्रव्यं जाङ्गमं स्थावरं तथा।
क्रयविक्रयधर्मेषु सर्वं तत्पण्यमुच्यते।।

निक्षिप्तं वा परद्रव्यं नष्टं लब्ध्वा अपहृत्य वा।
विक्रीयते असमक्षं यत् स ज्ञेयोअस्वामिविक्रयः।।[13]

loke'smin dvividhaṃ dravyaṃ jāṅgamaṃ
sthāvaraṃ tathā।
krayavikrayadharmeṣu sarvaṃ tatpaṇyamucyate।।

nikṣiptaṃ vā paradravyaṃ naṣṭaṃ labdhvā apahṛtya vā।
vikrīyate asamakṣaṃ yat sa jñeyoasvāmivikrayaḥ।।[13]

Partnership (sambhūyasamuthānam): *Nāradasmṛti* defines Partnership as that:

Where tradesmen or the like join together to carry on any business or enterprise, that is known as partnership.[14]

वणिक्प्रभृतयो यत्र कर्म संभूय कुर्वते।
तत्संभूयसमुत्थानम् व्यवहारपदं स्मृतम्।।[14]

vaṇikprabhṛtayo yatra karma saṃbhūya kurvate।
tatsaṃbhūyasamutthānam vyavahārapadaṃ smṛtam।।[14]

With regard to the punishment in relation to the violation of the contract *Manusmṛti* says:

A person who agrees to do some job in the form of contract with reference to the institutions like village, country or guild/corporation on oath and breaks the said agreement should be exiled from the country by the king.[15]

यो ग्रामदेशसंधानां कृत्वा सत्येन संविदम्।
विसंवदेन्नरो लोभात्तं राष्ट्राद्विप्रवासयेत्।।[15]

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yo grāmadeśasaṃghānāṃ kṛtvā satyena saṃvidam।
visaṃvadennaro lobhāttaṃ rāṣṭrādvipravāsayet।।[15]

Yājñavalkya also says that:

If any member of a company does an act, forbidden by the general body, or without their permission, or carelessly, and thereby causes a loss, he shall have to make good the same, if one protects its interests at a time of imminent danger, he shall be entitled to an additional share of one tenth of the profit as his reward.[16]

प्रतिषिद्धमनादिष्टं प्रमादाद्यश्च नाशितम्।
स तद्दद्याद्विप्लवाश्च रक्षितादृशमांशभाक्।।[16]

pratiṣiddhamanādiṣṭaṃ pramādādyaśca nāśitam।
sa taddadyādviplavāśca rakṣitāddaśamāṃśabhāk।।[16]

Resumption of Gift: (dattapradanikam): *smṛticandrika* defines 'Resumption of Gift asunder:

Where one wishes to resume an article which he has given as gift, it is called resumption of gift (dattapradanikam), a title of law.[17]

दत्वा द्रव्यमसम्यग्यत् पुनरादातुमिच्छति।
दत्ताप्रदानिकं नाम व्यवहारपदं हि तत्।।[17]

datvā dravyamasamyagyat punarādātumicchati।
dattāpradānikaṃ nāma vyavahārapadaṃ hi tat।।[17]

Payment of wages (vetanadāna) : Wages to be considered as fair must be sufficient to procure the necessities of life from out of the wages. With regard to the minimum wages *Śukranīti* says that:

The wage of an employee should therefore be a fair wage, so as to enable him to procure all the necessary requirements of life.[18]

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अवश्यपोष्यवर्गस्य भरणं भृतकादूभवेत्।
तथा भृतिस्तु संयोज्या तद्योग्या भृतकाय वै।।[18]

avaśyaposyavargasya bharaṇaṃ bhṛtakādūbhavet।
tathā bhṛtistu saṃyojyā tadyogyā bhṛtakāya vai।।[18]

About non-payment of wages *smṛticandrika* says:

If one who has undertaken to render service, fails to render service, it is called breach of contract of service-non-payment of wages a topic of law.[19]

अभ्युपेत्य तु शुश्रूषां यस्तां न प्रतिपद्यते।
वेतनस्यानपाकर्म तद्विवादपदं स्मृतम्।।[19]

abhyupetya tu śuśrūṣāṃ yastāṃ na pratipadyate।
vetanasyānapākarma tadvivādapadaṃ smṛtam।।[19]

With regard to the sick person's absence from duty Manu says that:

If a sick person after getting fit resumes his duty, he is entitled for full payment even after lapse of a long period.[20]

आर्तस्तु कुर्यात्स्वस्थः सन्यथाभाषितमादितः।
स दीर्धस्यापि कालस्य तल्लभेतैव वेतनम्।।[20]

ārtastu kuryātsvasthaḥ sanyathābhāṣitamāditaḥ।
sa dīrdhasyāpi kālasya tallabhetaiva vetanam।।[20]

It shows the humane approach towards workers in ancient Bhārat.

Transgression of Compact (samvidyātikramaḥ): *smṛticandrika explains* 'Transgression of Compact' as:

The set of rules settled amongst heretics (pakandis) and associations of persons who are believers in the Vedās (nigamās) and

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others are called compact or established usage ; violation of this forms the topic of law called transgression of compact (samvidyātikramaḥ) [21]

पाषण्डनैगमादीनां स्थितिः समय उच्यते।
समयस्यानपाकर्म तद्विवादपदं स्मृतम्।।[21]

pāṣaṇḍanaigamādīnāṃ sthitiḥ samaya ucyate।
samayasyānapākarma tadvivādapadaṃ smṛtam।।[21]

Sale and Purchase (krayavikrayānusāya): With regard to the inclusion of incidental charges of a transaction *Yājñavalkyasmṛti* says:

Adding the incidental charges to the cost of the commodity, let a price be fixed which shall be equitable both to the buyer and the seller.[22]

पण्यस्योपरि संस्थाप्य व्ययं पण्यसमुद्भवम्।
अर्धोऽनुग्रहकृत्कार्यः क्रेतुविक्रेतुरेव च।। [22]

paṇyasyopari saṃsthāpya vyayaṃ paṇyasamudbhavam।
ardho'nugrahakṛtkāryaḥ kretuvikretureva ca।।[22]

Dispute between Master and Servant (svāmipālavivāda): The law regulating the rights and liabilities of master and servant has been dwelt upon in three different titles. Manu has topics viz., Vetanadana (payment of wages) and Swamipala Vivada (dispute between master and servant).Yājñavalkya deals it as breach of contract. It is mentioned in *Śukranīti* that:

By payment of very low wages, employees of the king are likely to become his enemies and they are also likely to become plunderers of treasuries and cause harassment to the general public.[23]

ये भृत्या हीनभृतिकाः शत्रवस्ते स्वयं कृताः।
परस्य सधकास्ते तु छिद्रकोशप्रजाहराः।।[23]

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ye bhṛtyā hīnabhṛtikāḥ śatravaste svayaṃ kṛtāḥ।
parasya sadhakāste tu chidrakośaprajāharāḥ।।[23]

Boundary dispute (sīmavivāda): *nāradasmṛti* as per *Dharmakośa* explains the Boundary Dispute as:

Whenever a decision as regards the boundary of an embankment, landed property, a field cultivated or waste becomes necessary, the topic is called Boundary Dispute (sīmavivāda)[24]

सेतुकेदारमर्यादा विकृष्टाकृष्टनिश्चयः।
क्षेत्राधिकारो यत्र स्याद्विवादः क्षेत्रजस्तु सः।।[24]

setukedāramaryādā vikṛṣṭākṛṣṭaniścayaḥ।
kṣetrādhikāro yatra syādvivādaḥ kṣetrajastu saḥ।।[24]

About this topic Manu further says that:

In case of border dispute when there are no reliable marks and no witnesses to testify, a King should use his own discretion and decide the case in a way that is beneficial to the entire village- this is the injunction of the śāstrās.[25]

सीमायामविषह्यायां स्वयं राजैव धर्मवित्।
प्रदिशेद्भूमिमेतेषामुपकारादिति स्थितिः।।[25]

sīmāyāmaviṣahyāyāṃ svayaṃ rājaiva dharmavit।
pradiśedbhūmimeteṣāmupakārāditi sthitiḥ।।[25]

A deed settling a boundary dispute becomes unassailable after twenty years.

Criminal Law: The growth of criminal law in India went hand in hand with the growing requirements of the social system as a whole. The content of legal texts bears ample testimony to the pattern of its development. Dharmasūtrās, which are the earliest texts dealing with legal matters, contain no elaborate dicta on

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criminal law. *Manusmṛti* laid the foundations of the restructured Hindu society after the advent of Buddhism, and it is in this work that we find the specific mention of certain issues pertaining to criminal law. These issues form part of the titles of law put forth in the *Manusmṛti*. The development of criminal law in the era of the composition of *Manusmṛti* seems significant. But the zenith of sophistication of the traditional Indian system of criminal law was reached in the era of later smṛtis, when the society attained a high degree of complexity as a result of the growth of trade and industry. This is shown by the elaborate treatment given to various kinds of crime and intricate provisions for dealing with them in the smṛtis of Bṛhaspati, Nārada and Katyayana. These smṛtis give detailed consideration to crimes against person, including abuse and assault of various kinds, crimes relating to property, both public and private, and sex offence. The provisions relating to all these types of crimes reflect the conditions in the society at that time. The system of law naturally sought to fortify and legitimize the basic structure of society. The nature and severity of the punishment prescribed for the same offence varied according to the Varna of the person against whom it was committed. It also varied according to the position of the offender.

A clear demarcation is observed with regard to the civil and criminal offences. King should not initiate civil action; it is for the person whose right is violated whereas in the matter of criminal offences it is the primary responsibility of the King or his representative officers to initiate action suo motu on mere information after due investigation. The special responsibility of the King (State) in the matter of controlling crimes, detection of crimes and punishing offenders is dealt elaborately in *Manusmṛti* which says that:

Except punishment there is no other way to check the sinful activities and the sinners who move in the society incognito and commit the crime.[26]

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नहि दण्डादृते शक्यः कर्तुं पापविनिग्रहः।
स्तेनानां पापबुद्धीनां निभृतं चरतां क्षितौ।।[26]

nahi daṇḍādṛte śakyaḥ kartuṃ pāpavinigrahaḥ।
stenānāṃ pāpabuddhīnāṃ nibhṛtaṃ caratāṃ kṣitau।।[26]

Classification of Crimes: Whatever act is done by the use of force is called sāhasa or heinous offence. With regard to the classification of *Crimes, smṛticandrika (Bṛhaspatismṛti) says:*

Manslaughter (manuṣyamāraṇam); Theft (cauryam); Adultery (paradārābhimarṣaṇam); the two parushyas viz., (vākpāruṣyam) defamation and (daṇḍapāruṣyam) assault are the four types of crimes (sāhasa)[27]

मनुष्यमारणं चौर्यं परदाराभिमर्शनम्।
पारुष्यमुभयं चेति साहसं स्याच्चतुर्विधम्।।[27]

manuṣyamāraṇaṃ cauryaṃ paradārābhimarśanam।
pāruṣyamubhayaṃ ceti sāhasaṃ syāccaturvidham।।[27]

With regard to the acts committed in self defence *Manusmṛti* clarifies that:

Any person can slay without hesitation an assassin who approaches him with murderous intent, whether the assassin is one's own teacher, a minor, an aged man or a Brahman well versed in the Vedās. In such a situation a person commits no sin in killing a ruffian whether in a secluded place or before the world. This is because the anger of a ruffian provokes the anger of the defender.[28]

गुरुं वा बालवृद्धौ वा ब्राह्मणं वा बहुश्रुतम्।
आततायिनमायान्तं हन्यादेवाविचारयन्।।

नाततायिवधे दोषो हन्तुर्भवति कश्चन।
प्रकाशं वाऽप्राशं वा मन्युस्तं मन्युमृच्छति।।[28]

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gurum̐ vā bālavṛddhau vā brahmaṇaṃ vā bahuśrutam।

ātatāyinamāyāntaṃ hanyādevāvicārayan।।

nātatāyivadhe doṣo hanturbhavati kaścana।

prakāśaṃ vā'prāśaṃ vā manyustaṃ manyumṛcchati।।[28]

This compares well with the provision of self defence in IPC.

Defamation (vākpāruṣyam) : Rama jois in his treatise *'Legal and Constitutional History of India'* refers to the definition of 'Defamation' given by *Kātyāyanasmṛti:*

When a person insults another by uttering whatever is censurable according to popular notions, or by making sound signs or imitation, he commits the offence of defamation.[29]

हुक्कारः कासनं चैव लोके यच्च विगर्हितम्।
अनुकुर्यादनुब्रूयात् वाक्पारुष्यं तदुच्यते।।[29]

hukkāraḥ kāsanaṃ caiva loke yacca vigarhitam।

anukuryādanubrūyāt vākpāruṣyaṃ taducyate।।[29]

A comparison of the ancient law of Vakparushya with the corresponding law now in force viz., Sec. 499 of IPC reveals several similarities. For example Sec. 499 says that an imputation which harms the reputation of another is defamation.

Assult (daṇāḍapāruṣyam): *smṛticandrika* defines assult as:

Injury to the limbs of another, inflicted with one's hand, foot, or with weapon or otherwise or defiling him with ashes or the like, constitutes the offence of assault.[30]

परगात्रेष्विभद्रोहो हस्तपादायुधादिभिः।
भस्मादिभिश्चोपघातो दण्डपारुष्यमुच्यते।।[30]

paragātreṣvbhidroho hastapādāyudhādibhiḥ।

bhasmādibhiścopaghāto daṇḍapāruṣyamucyate।।[30]

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The offences falling under daṇḍapāruṣyam correspond to the offence of assault, using criminal force and causing hurt or grievous hurt, which are defined under sec. 351, 350, 321, and 322, of the Indian Penal code.

Theft (steyam): **Rama jois in his treatise** *'Legal and Constitutional History of India'* refers to the definition of theft as given by *kātyāyanasmṛti:*

Depriving a man of his wealth either clandestinely or openly, either during night or day time, is known as theft.[31]

प्रच्छन्नं वा प्रकाशं वा निशायामथवा दिवा।
यत्परद्रव्यहरणं स्तेयं तत्परिकीर्तितम्।। [31]

pracchannaṃ vā prakāśaṃ vā niśāyāmathavā divā।
yatparadravyaharaṇaṃ steyaṃ tatparikīrtitam।।[31]

The definition of Steya given in the smṛtis is comparable to the definition of 'theft' in sec. 378 of the Indian Penal Code.

Offence by violence (sāhasa)**:** *smṛticandrika* says that:

Whatever act is done by the use of force (sāhasa) is called heinous offence.[32]

साहसा क्रियते कर्म यत्किञ्चिद्धलदर्पितैः।
तत्साहसमिति प्रोक्तं सहो बलमिहोच्यते।।[32]

sāhasā kriyate karma yatkiñciddhaladarpitaiḥ।
tatsāhasamiti proktaṃ saho balamihocyate।।[32]

Offences by violence dealt in smṛtis compare well with the contents of Sec. 349, 350, 319, and 322 of I.P.C which deal with force, criminal force, with hurt and grievous hurt.

Adultery (Strisangrahanam): *smṛticandrika* **defines adultery as:**

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Unlawful coming together of a man and woman for sexual enjoyment constitutes Adultery.[33]

स्त्रीपुंसयोर्मिथुनीभावः सङ्हणम्। [33]

strīpuṃsayormithunībhāvaḥ saṅrahaṇam।[33]

Adultery or immoral sexual enjoyment was regarded as the most heinous and degrading offence. The Smṛtis insisted that sexual enjoyment must be only between duly married husband and wife. Any sexual enjoyment outside wedlock was tabooed. Sec. 375 defines the offence of rape which is same as the Strisangrahana dealt in smṛtis. Manu says that:

Sending presents to a woman other than one's own wife, to play jokes, to touch her or her ornament and clothes, sitting together on a cot are acts which are said to constitute Strisangrahana.[34]

उपचारक्रिया केलिः स्पर्शो भूषणवाससाम्।
सह खट्वासनं चैव सर्वं संग्रहणं स्मृतम्।।[34]

upacārakriyā keliḥ sparśo bhūṣaṇavāsasām।
saha khaṭvāsanaṃ caiva sarvaṃ saṃgrahaṇaṃ
smṛtam।।[34]

Duties of husband and wife (stripumdharma): It is stated in *smṛticandrika*:

That topic of law in which the law for men and women regarding marriage and such other relation is set out is called duties of husband and wife ('Stripumdharma')[35]

विवाहादिविधिः स्त्रीणां यत्र पुंसां च कीर्त्यते।
सत्रीपुंसयोगसंज्ञं तद्विवादपदमुच्यते।।[35]

vivāhādividhiḥ strīṇāṃ yatra puṃsāṃ ca kīrtyate।
satrīpuṃsayogasaṃjhaṃ tadvivādapadamucyate।।[35]

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Sec. 9-13 of Hindu Marriage Act 1955 deals with the disputes between wife and husband. Sec. 125 of CrPC deals with the maintenance of the spouse, child and parents. These provisions compare well with the contents of the topic 'Stripumdharam.

Partiton: (vibhāgaḥ) *smṛticandrika* treats as topic of law:

Partition (विभागः) of paternal property undertaken by the son is called by the learned partition of share (Dāyabhāga) and it forms a topic of law.[36]

विभागोर्थस्य पित्र्यादेः पुत्रैर्यत्र प्रकल्प्यते।
दायभाग इति प्रोक्तं व्यवहारपदं बुधैः।। [36]

vibhāgorthasya pitryādeḥ putrairyatra prakalpyate।
dāyabhāga iti proktaṃ vyavahārapadaṃ budhaiḥ।।[36]

Betting and gambling (dyūtasamahvaya): It is stated in *smṛticandrika* that:

Gambling with dice, small pieces of leather, little staves of ivory, or the like, and also betting on birds is called betting and gambling.[37]

अक्षवर्ध्रशलाकाद्यै देवनं जिह्मकारितम्।
पमक्रीडावयोभिश्च पदं द्यूतसमाह्वयम्।।[37]

akṣavardhraśalākādyai devanaṃ jihmakāritam।
pamakrīḍāvayobhiśca padaṃ dyūtasamāhvayam।।[37]

With regard to this wager *Manusmṛti* further elaborates asunder:

When inanimate things are used for staking money on them, it is called Dyuta (gambling), and when animated beings are used for the same purpose it is called Samahvaya (betting)[38]

अप्राणिभिर्यत्क्रियते तल्लोके द्यूतमुच्यते।
प्राणिभिः क्रियते यस्तु स विज्ञेयः समाह्वयः।।[38]

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aprāṇibhiryatkriyate tallokē āyutamucyatē।

prāṇibhiḥ kriyate yastu sa vijñeyaḥ samāhvayaḥ।।[38]

Indian courts and legislations have always considered gambling to be a pernicious and immoral activity vide IPC, 294- A

Prakirnaka (Miscellaneous matters): Apart from eighteen major topics, law had been laid down on a variety of subjects under the heading 'miscellaneous matters'. Kātyāyana for the first time introduced a chapter under the heading Prakirnaka. When one of these topics becomes the subject matter of a dispute, a trial will be conducted. How a trial has to proceed and the related details are discussed in the next chapter.

End Notes

1 Devana Bhatta. *Smṛti Chandrika,* Vol.III. (Bombay. Govt Oriental Library Series, 1914&1916) p.1. KS.25, 26

2 *Yājñavalkyasmṛti (Mitākṣarānusari)* Ed. Mahamaho-padhyaya Dr.Pullela Sri ramachandrudu. (Nandanam, Hyderabad. 2003) II-5

3 *Bṛhaspatismṛti.* Ed. Aiyangar, K.V. Rangaswami. (Baroda, Gaikwad's Oriental Series, 1941) I-1

4 Ibid., I-9

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iv) Trial (Four Parts)

The origin of legal procedure:

It is said that as long as everybody in the society follows dharma there is no need to have a detailed legal structure. But when people transgress the rules prescribed as per yuga-dharma, there arises a need to have a detailed legal structure. With regard to the genesis of legal procedure *Nāradasmṛti* says that:

At the time when men were disposed towards the sacred law only and when they spoke nothing but truth, there was no legal procedure, nor was there hatred or covetousness.[1]

धर्मैकतानाः पुरुषा यदासन् सत्यवादिनः।
तदा न व्यवहारोऽभून्नद्वेषो न च मत्सरः।।[1]

dharmaikatānāḥ puruṣā yadāsan satyavādinaḥ।
tadā na vyavahāro'bhūnnadveṣo na ca matsaraḥ।।[1]

Bṛhaspati endorsed this view and states that:

vyavahāra (व्यवहारः) becomes necessary on account of people being moved by avarice and hatred.[2]

धर्मप्रधानाः पुरुषाः पूर्वमासन् अहिंसकाः।
लोभद्वेषाभिभूतानां व्यवहारः प्रकीर्तितः।। [2]

dharmapradhānāḥ puruṣāḥ pūrvamāsan ahiṃsakāḥ।
lobhadveṣābhibhūtānāṃ vyavahāraḥ prakīrtitaḥ।।[2]

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In former ages men were strictly virtuous and devoid of mischievous propensities. When they were overpowered by passion, covetousness and hatred, legal proceedings came to be prescribed. Nārada also states as mentioned in *Dharmakośa* that:

When people violated the sacred law, legal procedure was revealed, and the examiner of legal procedure was the King, who himself has an authority to punish. He further observes that vyavahāra was originated to protect people and to ensure rule of Dharma (धर्मः) (law).[3]

नष्टे धर्मे मनुष्याणां व्यवहारः प्रकीर्तितः।
द्रष्टा च व्यवहाराणां राजा दण्डधरः स्वयम्।।
लोकसंरक्षणार्थाय धर्मसंस्थापनाय च।।[3]

naṣṭe dharme manuṣyāṇāṃ vyavahāraḥ prakīrtitaḥ।
draṣṭā ca vyavahārāṇāṃ rājā daṇḍadharaḥ svayam।।
lokasaṃrakṣaṇārthāya dharmasaṃsthāpanāya ca।।[3]

Institution of a legal procedure: *Yājñavalkyasmṛti* says:

When one is aggrieved by others in a way which is opposed to smṛti and good conduct, and one reports the matter to the king this is a basis for legal procedure.[4]

स्मृत्याचारव्यपेतेन मार्गेणाधर्षितः परैः।
आवेदयति चेद्राज्ञे व्यवहारपदं हि तत्।।[4]

smṛtyācāravyapetena mārgeṇādharṣitaḥ paraiḥ।
āvedayati cedrājñe vyavahārapadaṃ hi tat।।[4]

Order I, R 1 of CPC also says that if a right to relief as per an act exists in a person he can join as plaintiff. *nāradīyamanu Saṃhitā* says that:

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The legal procedure is of two kinds: (1) attended with a wager and (2) not attended with a wager; the one attended with a wager is different from the other one because in addition, a wager is placed before the plaint is put in writing.[5]

सोत्तरोऽनुत्तरश्चैव स विज्ञेयो द्विलक्षणः।
सोत्तरोऽभ्यधिको यत्र विलेखात्पूर्वकः पणः।।[5]

sottaro'nuttaraścaiva sa vijñeyo dvilakṣaṇaḥ।
sottaro'bhyadhiko yatra vilekhātpūrvakaḥ paṇaḥ।।[5]

Order IV, R.1 CPC says that every suit shall be instituted by presenting a plaint.

It is surprising to note that in the *Arthaśāstra* of Kautilya which is placed around 300 B.C, also gives the details with regard to the institution of trial and its proceedings almost conforming to the procedures obtaining in the present system. The plaintiff and the defendant shall both be persons fit to sue and be sued; they shall provide adequate sureties to cover fines and payments for loss of suits. Kautilya says:

स्वयंवादिदण्डो दशबन्धः।[6]

svayaṃvādidaṇḍo daśabandhaḥ।[6]

The fine for one who voluntarily admits is one-tenth.[6]

The court clerk shall, record the statements of both the plaintiff and the defendant. These shall include the substance of the dispute and the questions rose. The record shall show the date and time the case was filed, the place, the amount in dispute and personal details of the plaintiff and the defendant.

The statements shall be recorded in due order of subject matter. They shall be scrutinized by the judge for accuracy.[7]

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संवत्सरमृतु मासं पक्षं दिवसं करणमधिकरणमृणं वदकावदकयोः कृतसमर्थाव स्थयोर्देशग्रामजातिगोत्रनामकर्माणि चाभिलिख्य वादिप्रतिवादिप्रश्नानर्थानुपूर्व्या निवेशयेत्। निविष्टांश्चावेक्षेत।

saṃvatsaramṛtuṃ māsaṃ pakṣaṃ divasaṃ karaṇama-dhikaraṇamṛṇaṃ vedakāvedakayoḥ kṛtasamarthāvas-thayordeśagrāmajātigotranāmakarmāṇicābhilikhya vādiprativādipraśnānarthānupūrvyā niveśayet। niviṣṭāṃścāvekṣeta।[7]

It is also stated that:

The same case shall not be filed against a defendant twice.[8]

न चाभियुक्तेऽभियोगोऽस्ति।[8]

nacābhiyukte'bhiyogo'sti

Section 11, CPC also takes the same view by "Res judicata." It means that the same dispute between the same parties in a former suit bars the second suit. It further explains that the expression "former suit" shall denote a suit which has been decided prior to the suit in question whether or not it was instituted prior thereto. Kautilya observes:

The accused shall not file a counter-complaint, except in cases of strife, forcible seizure and association in carvans.[9]

अभियुक्तो न प्रत्यभियुञ्जीत, अन्यत्र कलहसाहससार्थसमवायेभ्यः।[9]

abhiyukto na pratyabhiyuñjīta, anyatra kalahasāhasasārthasamavāyebhyaḥ।[9]

पूर्वपक्षः ज्ञातःपादो द्वितीयास्तुत्तरस्तथा।
क्रियापादस्तथा वाच्यश्चतुर्थो निर्णयः स्तथा।।[9]

pūrvapakṣaḥ jñātaḥpādo dvitīyāstuttarastathā।
kriyāpādastathā vācyaścaturtho nirṇayaḥ stathā।।[9]

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The four parts of legal procedure: According to Bṛhaspati the legal procedure has four parts.

The plaint is considered to be the first part and the reply the second; the trial is said to be the third part, and the decision the fourth.[10]

पूर्वपक्षः ज्ञातःपादो द्वितीयास्तुत्तरस्तथा।
क्रियापादस्तथा वाच्यश्चतुर्थो निर्णयः स्तथा।।[10]

pūrvapakṣaḥ jñātaḥpādo dvitīyāstuttarastathā।
kriyāpādastathā vācyaścaturtho nirṇayaḥ stathā।।[10]

Plaint: Sufficient care has to be taken in drafting a plaint. It is said that a plaint should be brief in words, rich in content, unambiguous, free from confusion, devoid of improper arguments and capable of being traversed by the defendant and it should set out the prayer sought against the opponent. Bṛhaspati explains the requirements of a valid plaint and says that it has to be:

Free from the defects of the statement, 2) provided with a valid cause, 3) definite, 4) in accordance with common practice, 5) concisely worded, 6) explicit, 7) free from doubts, 8) free from contradictory causes, 9) capable of meeting opponent's arguments.[11]

प्रतिज्ञादोषनिर्मुक्तं साध्यं सत्कारणान्वितम्।
निश्चितं लोकसिद्धं च पक्षं पक्षविदो विदुः।।

अल्पाक्षरः प्रभूतार्थो निस्संदिग्धो निराकुलः।
विरोधिकारणैर्मुक्तो विरोधिप्रतिषेधकः।। [11]

pratijñādoṣanirmuktaṃ sādhyaṃ satkāraṇānvitam।
niścitaṃ lokasiddhaṃ ca pakṣaṃ pakṣavido viduḥ।।

alpākṣaraḥ prabhūtārtho nissaṃdigdho nirākulaḥ
virodhikāraṇairmukto virodhipratiṣedhakaḥ।।[11]

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Order VII Rule, 1 of the code of civil procedure compares well with these particulars.

After the plaint or complaint is presented and the statement of the party is recorded the court should examine the contents of the declaration and decide whether the same is maintainable. Order VI, Rule 2 of the code of civil procedure also states the same as to the requirement of considering the plaint. If the case is legally maintainable, then the court should take up the case, on record and note down the month, the fortnight, the day and other particulars, and issue summons to the opposite party to appear before the court and answer the allegations.

Kātyāyanasmṛti as referred to in *Vyavahāracintāmaṇi* says that:

The cognizance of plaint should be taken if it is one which is free from faults of declaration, is capable of proof, contains good grounds, and is precise and not self-contradictory.[12]

प्रतिज्ञादोषनिर्मुक्तं साध्यं सत्कारणान्वितम्।
निश्चितं लोकसिद्धं च पक्षं पक्षविदो विदुः।।[12]

pratijñādoṣanirmuktaṃ sādhyaṃ satkāraṇānvitam।
niścitaṃ lokasiddhaṃ ca pakṣaṃ pakṣavido viduḥ।।[12]

As to the importance of the plaint *nāradīyamanu Saṃhitā* says that:

The statement of the plaint is considered to be the fundamental part of legal procedures; if the plaintiff falls short of it, he is lost; if he carries it through, he is successful.[13]

सारस्तु व्यवहाराणां प्रतिज्ञा समुदाहृता।
तद्धानौ हीयते वादी तरंस्तामुत्तरो भवेत्।।[13]

sārastu vyavahārāṇāṃ pratijñā samudāhṛtā।
taddhānau hīyate vādī taraṃstāmuttaro bhavet।।[13]

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With regard to the amendment of the plaint Bṛhaspati says that:

Once a plaint is presented with certain content one should not introduce any change nor should one make it a different plaint. By doing so one loses the original plaint. The plaintiff or the complainant who has made a declaration before the court may amend his declaration if he felt that he had omitted to give some particulars or, by mistake omitted to make any allegations, by submitting his additional statement or amendment (pratyakalita or what is interposed) before the opposite party had filed with the court his answer. *He makes it clear that the plaintiff may amend the plaint by subtraction or addition as long as the defendant does not submit their reply in the presence of the judges.*[14]

यं चार्थमभियुंजीत न तं विप्रकृतिं नयेत्।
न च पक्षान्तरं गच्छेत् गच्छन् पूर्वात्सहीयते।।

ऊनाधिकं पूर्वपक्षे तावद्वादी विशोधयेत्।
न दद्यादुत्तरं यावत् प्रत्यर्थी सभ्यसन्निधौ।।[14]

yaṃ cārthamabhiyuṃjīta na taṃ viprakṛtiṃ nayet।
na ca pakṣāntaraṃ gacchet gacchan pūrvātsahīyate।।

ūnādhikaṃ pūrvapakṣe tāvadvādī viśodhayet।
na dadyāduttaraṃ yāvat pratyarthī sabhyās annidhai।।[14]

While examining the way to get the plaint amended it is also said in *nāradīyamanu Saṃhitā* that the plaintiff is entitled to make an amendment as long as the defendant does not file their reply or counter to the plaint.[15]

भाषायामुत्तरं यावत् प्रत्यर्थी नाभिलेखयेत्।
अर्थी तु लेखयेत्तावद्वावन्नोत्तरदर्शनम्।।[15]

bhāṣāyāmuttaraṃ yāvat pratyarthī nābhilekhayet।
arthī tu lekhayettāvadvāvannottaradarśanam।।[15]

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The Order, VI, Rule, 17 of the code of civil procedure though compares well with this procedure appears to be little liberal. It mentions that the court may at any stage at the proceedings allow either party to alter or amend his pleadings in such a manner and on such terms as may be just. "Provided that no application for amendment shall be allowed after the trial has commenced, unless the court comes to the conclusion that in spite of due diligence, the party could not have raised the matter before the commencement of trial" In *Nāradasmṛti* as mentioned in *Dharmakośa* it is further made clear that:

The facility of seeking amendment cannot be used to make out a new case. He observes that if the plaintiff forsakes his original claim and makes out entirely a new case, the plaintiff loses his suit.[16]

पूर्ववादं परित्यज्य योऽन्यमालम्बते पुनः।
वादसंक्रमणाज्ज्ञेयो हीनवादी स वै नरः।।[16]

pūrvavādaṃ parityajya yo'nyamālambate punaḥ।
vādasaṃkramaṇājñjñeyo hīnavādī sa vai naraḥ।।[16]

As regard this point, the well accepted principle under the C.P.C. also is that the plaintiff cannot be permitted to amend the plaint so as to make out entirely a new case, as also observed by the Hon'ble Supreme Court.[17]

Fallacies of Plaint: Bṛhaspati while dealing with the fallacies of the plaint says that:

The King should reject a plaint, which is unknown, defective, meaningless, purposeless, improvable, or adverse. A plaint is unknown when it is not made by anybody; it is defective when it refers to another person's benefit regardless of one's own benefit. A plaint is said to be meaningless when it refers to a trifling offence and when it refers to a small amount; and purposeless when it does not contain any transaction or molestation. The wise call unprovable an impossible

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plaint such as "He owes me a bow made of hare's horn. A plaint that has been submitted is called adverse when it is directed against the chief judge, the King, a town or the kingdom.[18]

अप्रसिद्धं सदोषं च निरर्थं निष्प्रयोजनम्।
असाध्यं वा विरुद्धं वा राजा पक्षं विवर्जयेत्।।

न केनचित्कृतो यस्तु सोऽप्रसिद्ध उदाहृतः।
अन्यार्थः स्वार्थहीनश्च सदोषः परिकीर्तितः।।

स्वल्पापराधश्चाल्पार्थो निरर्थक इति स्मृतः।
कार्यबाधाविहीनश्च विज्ञेयो निष्प्रयोजनः।।

ममानेन प्रदातव्यं शशशृङ्गमयं धनुः।
असम्भाव्यमसाध्यं तु पक्षमाहुर्मनीषिणः।।

यस्मिन्नावेदिते पक्षे प्राड्विवाके च राजनि।
पुरे राष्ट्रे विरोधः स्याद्विरुद्धः सोऽभिधीयते।।[18]

aprasiddhaṃ sadoṣaṃ ca nirarthaṃ niṣprayojanam।
asādhyaṃ vā viruddhaṃ vā rājā pakṣaṃ vivarjayet।।

na kenacitkṛto yastu so'prasiddha udāhṛtaḥ।
anyārthaḥ svārthahīnaśca sadoṣaḥ parikīrtitaḥ।।

svalpāparādhaścālpārtho nirarthaka iti smṛtaḥ।
kāryabādhāvihīnaśca vijñeyo niṣprayojanaḥ।।

mamānena pradātavyaṃ śaśaśṛṇgamayaṃ dhanuḥ।
asambhāvyamasādhyaṃ tu pakṣamāhurmanīṣiṇaḥ।।

yasminnāvedite pakṣe prāḍvivāke ca rājani।
pure rāṣṭre virodhaḥ syādviruddhaḥ so'bhidhīyate।।[18]

Order VI, Rule 16 of CPC states the same thing with regard to the striking out plaint.

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Rama Jois in his treatise *Legal and Constitutional History of India* refers to *Kātyāyanasmṛti* as to the grounds on which a plaint is liable to be rejected:

i) If the case sought to be made out is opposed to law or usage or Rajashasana and suffers from multiplicity of rights falling under different titles of law. ii) If it does not mention time or place; if there is no mention of the substance and the amount, and if it does not contain the evidence for the probandum. iii) If it does not state that the opposite party has done any unlawful act or was not willing to do what he was bound to do in law. iv) If it shows that the allegations in the plaint itself are self-contradictory so as to make out no case for the plaintiff. V) If the grievance in the plaint is imaginary and does not disclose any injury caused to the plaintiff, or violation of any rule of the Smṛtis relating to civil matters or any offence committed by the opposite party.[19]

यश्च राष्ट्रविरुद्धश्च यश्य राज्ञा विवर्जितः।
अनेकपदसंकीर्णः पूर्वपक्षो न सिध्यति।।

देशकालविहीनश्च द्रव्यसंख्याविवर्जितः।
साध्यप्रमाणहीनश्च पक्षोनादेय इष्यते।।

न्यायस्थं नेच्छते कर्तुम् अन्यायं वा करोत्ययम्।
न लेखयति यस्त्वेवं तस्य पक्षो न सिध्यति।।

अप्रसिद्धं निराबाधं निरर्थं निष्प्रयोजनम्।
असाध्यं वा विरुद्धं वा पक्षाभासं विवर्जयेत्।।[19]

yaśca rāṣṭraviruddhaśca yaśya rājñā vivarjitaḥ।
anekapadasaṃkīrṇaḥ pūrvapakṣo na sidhyati।।

deśakālavihīnaśca dravyasaṃkhyāvivarjitaḥ।
sādhyapramāṇahīnaśca pakṣonādeya iṣyate।।

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nyāyasthaṃ necchate kartum anyāyaṃ vā karotyayam।
na lekhayati yastvevaṃ tasya pakṣo na sidhyati।।

aprasiddhaṃ nirābādhaṃ nirarthaṃ niṣprayojanam।
asādhyaṃ vā viruddhaṃ vā pakṣābhāsaṃ vivarjayet।।[19]

With regard to proper plaint Rama Jois in his treatise '*Legal and Constitutional History of India* refers to *Kātyāyanasmṛti* says that:

When the plaintiff has presented a proper plaint, then the defendant should be called upon to give his reply. With regard to the service of notice on defendant it is stated that the notice can be served through the plaintiff, if he chooses to do so, or through bailiff whose duty is to enforce the attendance of the opposite party at court.[20]

यदा त्वेवंविधः पक्षः कल्पितः पूर्ववादिना।
दद्यात तत्पक्षसंबद्धं प्रतिवादी तदोत्तरम्।। [20]

yadā tvevaṃvidhaḥ pakṣaḥ kalpitaḥ pūrvavādinā।
dadyāta tatpakṣasaṃbaddhaṃ prativādī tadottaram।।[20]

The Reply: When the plaint is free from defects and the defendant has taken cognizance of its content, with regare to the reply *BṛhaspatiSmṛti* says that:

After the plaint has been well defined, after the things to be mentioned have been separated from those not to be mentioned, and after the content of the statement has been confirmed, the King should order the reply to be written down.[21]

विनिश्चिते पूर्वपक्षे ग्राह्याग्राह्यविशोषिते।
प्रतिज्ञाते स्थिरीकृते लेखयेदुत्तरं ततः।।[21]

viniścite pūrvapakṣe grāhyāgrāhyaviśoṣite।
pratijñāte sthirīkṛte lekhayeduttaraṃ tataḥ।।[21]

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With regard to the tenor of the reply *smṛticandrika* says that:

When a plaint contains item wise details and plaintiff prefers the defendant should tender an answer item wise to such plaint, the defendant has to oblige by giving his answers item wise.[22]

Order VIII, Rule 1-5, deals with the contents of written statement. Order VIII, Rule 3 of CPC also states that the defendant must deal specifically with each allegation of fact. Order VI, Rule, 15 also says that the person who verifies the plaint as to its correctness, to the satisfaction of the court shall also furnish an affidavit in support of the plaint before proceeding further. Normally there would not be any counter claim from the defendant. In this regard *Vyavahāracintāmaṇi* refers to *Kātyāyanasmṛti*:

The defendant should never raise an accusation against the plaintiff, except in cases of verbal and physical assault, theft, adultery, and an urgent matter.[23]

अभियुक्तोअभियुक्तारं नाभियुंजीत कर्हिचित्।
अन्यत्र दण्डपारुष्य स्तेय संग्रहणात्ययात्।।[23]

abhiyuktoabhiyuktāraṃ nābhiyuṃjīta karhicit।
anyatra daṇḍapāruṣya steya saṃgrahaṇātyayāt।।[23]

Whereas Order VIII, rule-6 provides for a counter-claim by the defendant. The rules relating to written statement by a defendant shall apply to a written statement filed by the plaintiff in answer to a counter-claim.

With regard to the requirement of a valid reply, according to *Nārada smṛti,* as mentioned in *Vyavahāracintāmaṇi* that:

A valid reply must 1) fully cover the allegations mentioned in the plaint, 2) be appropriate, 3) free from doubts, 4) not confused and 5) understandable without interpretation.[24]

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पक्षस्य व्यापकं सारमसंदिग्धमनाकुलम्।
अव्याख्यागम्यमित्येतदुत्तरं तद्विदो विदुः।।[24]

pakṣasya vyāpakaṃ sāramasaṃdigdhamanākulam।
avyākhyāgamyamityetaduttaraṃ tadvido viduḥ।।[24]

In **Yājñavalkyasmṛti** it is stated that:

The answer of the defendant, who has heard the plaint, should be taken down in writing, in the presence of the plaintiff. Then the complainant should immediately write down the evidence in favour of his petition.[25]

श्रुतार्थस्योत्तरं लेख्यं पूर्ववदेकसन्निधौ।
ततोऽर्थी लेखयेत् सद्यः प्रतिज्ञातार्थसाधनम्।[25]

śrutārthasyottaraṃ lekhyaṃ pūrvavadekasannidhau।
tato'rthī lekhayet sadyaḥ pratijñātārthasādhanam।[25]

With regard to the possible kinds of reply as mentioned in the *Vyavahāracintāmaṇi* Kātyāyana says that:

The reply may be of four kinds viz., admission, denial, special plea and former judgement.[26]

सत्यं मिथ्योत्तरं चैव प्रत्यवस्कन्दनं तथा।
पूर्वन्यायविधिश्चैव उत्तरं स्याच्चतुर्विधम्।। [26]

satyaṃ mithyottaraṃ caiva pratyavaskandanaṃ tathā।
pūrvanyāyavidhiścaiva uttaraṃ syāccaturvidham।।[26]

Confession: With regard to the confession Bṛhaspati says that:

When the party accepts the plaint without producing an exception, this reply should be known as a confession; in case of an exception, a separate refutation is required.[27]

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अनुक्त्वा कारणं यत्र पक्षं वादी प्रपद्यते।
प्रतिपत्तिस्तु सा ज्ञेया कारण दूषणं पृथक्।।[27]

anuktvā kāraṇaṃ yatra pakṣaṃ vādī prapadyate।
pratipattistu sā jñeyā kāraṇaṃ dūṣaṇaṃ pṛthak।।[27]

The confession is a valid reply, which causes the plaint to be a proof of something accepted to be true. Order XII, Rule 1 of CPC also says that any party to a suit may give notice, by his pleading, or otherwise in writing, that he admits the truth of the whole or any part of the case of any other party.

Denial: With regard to the denial Kātyāyana says as mentioned in *Vyavahāra Cintāmaṇi* that:

If the defendant contradicts the plaint, according to the principles of legal procedure, this should be known as a reply by way of denial.[28]

अभियुक्तोऽभियोगस्य यदि कुर्यादपह्नवम्।
मिथ्या तत्तु विजानीयादुत्तरं व्यवहारतः।। [28]

abhiyukto'bhiyogasya yadi kuryādapahnavam।
mithyā tattu vijānīyāduttaraṃ vyavahārataḥ।।[28]

It is stated in *Vyasa Smṛti* as mentioned in *Vyavahāra Cintāmaṇi* that:

There are four kinds of denial viz., 1) "this is not true", 2)"I do not know", 3) "I was not present", and 4) "I was not born at that time".[29]

मिथ्यैतन्नाभिजानामि मम तत्र न संनिधिः।
अजातश्चास्मि तत्काल इति मिथ्या चतुर्विधा।।[29]

mithyaitannābhijānāmi mama tatra na saṃnidhiḥ।
ajātaścāsmi tatkāla iti mithyā caturvidhā।।[29]

Among these, "this is not true" is a contradiction in words; the other three are contradictions on facts. In this regard Kātyāyana

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also says that when the other party, after having heard the content of the plaint, refutes it either on facts or even in words, this kind of reply should be known to be a denial.

Reply by way of stronger exception: Bṛhaspati says that:

When the defendant replies to the content set forth by the plaintiff by adducing an exception, this is called reply by way of a stronger exception (pratyavaskandana.)[30]

अर्थिनाभिहितो योऽर्थः प्रत्यर्थी यदि तं तथा।
प्रपद्य कारणं ब्रूयात् प्रत्यवस्कन्दनं हि तत्।।[30]

arthināhhihito yo'rthaḥ pratyarthī yadi taṃ tathā।
prapadya kāraṇaṃ brūyāt pratyavaskandanaṃ hi tat।।[30]

That means when the defendant agrees that the contents or allegations set forth by plaintiff are true, viz., that something has been appropriated, but he adduces a reason why it is no longer due now, e.g., that it has been given back, etc., then this reply is a pratyavaskandana viz., by way of a strong exception.Kātyāyana interprets this particular context as mentioned in *Vyavahāra Cintāmaṇi* :

Through an exception even a plaint can become a reply; therefore, the trial is said always to establish the plaint.'[31]

कारणात्पूर्वपक्षोऽपि उत्तरत्वं प्रपद्यते। [31]

kāraṇātpūrvapakṣoapi uttaratvaṃ prapadyate। [31]

Reply by way of former judgment: Bṛhaspati says that:

The reply by way of 'former judgment' assumes the following form: "I have defeated him in this case before".[32]

आचारेणावसन्नोऽपि पुनर्लेखयते यदि।
सोऽभिदीयो जितः पूर्वं प्राङ्न्यायस्तु स उच्यते।।[32]

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ācārenāvasanno>pi punarlekhayate yadi।
so'bhidīyo jitaḥ pūrvaṃ prāṅnyāyastu sa ucyate।।[32]

Section 11 of the CPC deals with the Res Judicata. It says that the same dispute between the same parties in former suit bars second suit. The expression former suit shall denote a suit which has been decided prior to the suit in question whether or not it was instituted prior there to.

The fallacies of the reply: According to Kātyāyana as mentined in *Vyavahāra Cintāmaṇi* the following replies are not valid:

When the reply is a confession with regard to one part of the plaint, an exception with regard to another part, and a denial with regard to another part, it is invalid on account of the mixture. A reply is not valid when it is not connected with the subject, when it is too concise, when it is too broad, and when it pervades only part of the thesis. The wise do not approve of a reply which pervades irrelevant points, which is not clear, which is confused which requires interpretation, and which lacks precision.[33]

पक्षैकदेशे यत्सत्यमेकदेशे च कारणम्।
मिथ्या चैवैकदेशे स्यात् संकरात्तदनुत्तरम्।।

प्रकृतेन त्वसम्बद्धमत्यल्पमतिभूरि च।
पक्षैकदेशव्याप्येव तत्तु नैवोत्तरं भवेत्।।

असम्बद्धपदव्यापि निगूढार्थं तथाकुलम्।
व्याख्यागम्यसारं च नोत्तरं शस्यते बुदैः।।[33]

pakṣaikadeśe yatsatyamekadeśe ca kāraṇam।
mithyā caivaikadeśe syāt saṃkarāttadanuttaram।।

prakṛtena tvasambaddhamatyalpamatibhūri ca।
pakṣaikadeśavyāpyeva tattu naivottaraṃ bhavet।।

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asambaddhapadavyāpi nigūḍhārthaṃ tathākulam।

vyākhyāgamyasāraṃ ca nottaraṃ śasyate budaiḥ।।[33]

This position is similar to the contents of Order VIII, Rules 2, and 3 of CPC which states that if the denial is not specific and evasive in its nature then the defence statement shall not be allowed.

According to Bṛhaspati the following persons are to be treated as incapable of filing a valid reply:

The insane, intoxicated, those abandoned by their relatives or friends, those guilty of a major sin, the senseless, those subject to excessive anger, and children.[34]

उन्मत्तमत्तनिर्धूता महापातकदूषिताः।

जडातिकृद्धबालाश्च विज्ञेयास्तु निरुत्तराः।।[34]

unmattamattanirdhūtā mahāpātakadūṣitāḥ।

jaḍātikṛddhabālāśca vijñeyāstu niruttarāḥ।।[34]

The provisions in the Smṛtis regulating the contents of plaints and written statements are remarkable and they bear similarity on almost every aspect covered by Orders 6, 7 & 8, of C.P.C.

Adjournments: Normally plaintiff is not given any adjournment at this stage as he had enough time before filing his plaint. But the defendant's request for adjournment can be considered if it is on genuine grounds. As mentioned in *Vyavahāra Cintāmaṇi* Kātyāyana says:

If the defendant, after having heard the content of the plaintiff's writing, for some valid reason requests an adjournment in the suit, this should, no doubt, be granted to him. Even then, he says that no adjournment should be granted, if the value of the object would decrease, or if the object would be destroyed or abandoned, if it is an urgent matter.[35]

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शृत्वा लेखयतो ह्यर्थं प्रत्यर्थी कारणाद्यदि।
कालं विवादे याचेत तस्य देयो न संशयः।।

व्यपैति गौरवं यत्र विनाशस्त्याग स एव वा।
कालं तत्र न कुर्यात्तु कार्यमात्ययिकं हि तत्।। [35]

śṛtvā lekhayato hyarthaṃ pratyarthī kāraṇādyadi।
kālaṃ vivāde yāceta tasya deyo na saṃśayaḥ।।

vyapaiti gauravaṃ yatra vināśastyāga sa eva vā।
kālaṃ tatra na kuryāttu kāryamātyayikaṃ hi tat।। [35]

4.5.26 In *Bṛhaspatismṛti* also similar view is expressed. It is stated that:

If the defendant, after appearing before the court, either on account of fear, confusion or other reasons, asks for time, he should be given time according to his necessity. If a plaintiff is unable to put forward his case owing to incapacity or lack of courage, he should be given time according to his requirements.[36]

शालीनत्वात् भयात्तद्वत् प्रत्यर्थी स्मृतिविभ्रमात्।
कालं प्रार्थयते यत्र तत्रेमं लब्धुमर्हति।।

अभियोक्ताऽप्रगल्भत्वात् वक्तुं नोत्सहते यदा।
तस्य कालः प्रदातव्यः कालशक्त्यनुरूपतः।।[36]

śālīnatvāt bhayāttadvat pratyarthī smṛtivibhramāt।
kālaṃ prārthayate yatra tatremaṃ labdhumarhati।।

abhiyoktā'pragalbhatvāt vaktuṃ notsahate yadā।
tasya kālaḥ pradātavyaḥ kālaśaktyanurūpataḥ।।[36]

With regard to grant of adjournments modern system is not that strict when compare to the ancient procedure. Order XVII, Rule 1 of the Code of Civil Procedure says that the court may grant

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adjournments if sufficient cause is shown and it imposes costs in this regard on the person who seeks adjournment.

Imposition of restraint (Asedha): On the lodging of a plaint, it was open to a plaintiff to put restraint of any kind on the defendant. Such a restraint could be imposed by the plaintiff himself until the notice was served and he was in a position to secure an order of the court. The law gave that power to the plaintiff subject to several restrictions. Any such interim restraint imposed either by the plaintiff or by the court is binding and its disobedience is punishable. After lodging and affirming the plaint but before the arrival of summons, the defendant may be restrained by the plaintiff. Violation of such a restraint is punishable.

The restraints which could be imposed by a plaintiff against a defendant, pending service of summons are- local arrest, temporary arrest, inhibition from travelling and restraining from doing certain specified acts. The party on whom such a restraint is imposed shall not break the same. Order XXXIX, Rule 1&2, also provides the same facility to the plaintiff by issuing a temporary order restraining the defendant. And the rationale appears to be the preventive step to protect the property, the subject matter of the dispute, from damage before the final judgment. Rule 2(a) further provides that in the event of disobedience or breach of such temporary injunction the said property can be attached and the court may also order such person to be imprisoned.

Restrictions on imposing restraint: The following persons cannot be restrained: 1-one about to marry;2- one tormented by illness; 3- one about to perform sacrifice or make a charity; 4-one afflicted by calamity; 5-one accused by another; 6- one employed in king's service; 7- cowherds engaged in tending cattle; 8- cultivators during cultivating season;9- artisans, while engaged in their occupations; 10-soldiers during warfare; 11-a minor; 12- a messenger;13- one fulfilling a vow;14-one harassed by difficulties. They shall also be not liable to be summoned before the court for

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personal appearance. It shows that the authority of the plaintiff to restrain the defendant is almost limited.

As mentioned in *smṛticandrika* Kātyāyana *says that a defendant when restrained by an order of the king shall not disobey that order. Whereas Nāradasmṛti says that a person restrained in contravention of the said restrictions commits no offence by disobedience of such a restraint.*[37]

अभियुक्तश्च रुद्धश्च तिष्ठेयुश्च नृपाज्ञया।
आसिद्धस्तं परासेधमुत्क्रामन् नापराध्नुयात्।[37]

abhiyuktaśca ruddhaśca tiṣṭheyuśca nṛpājñayā।
āsiddhastaṃ parāsedhamutkrāman nāparādhnuyāt।[37]

With regard to the possibility of alteration of the plaint and the reply as mentioned in *Vyavahāra Cintāmaṇi* Kātyāyana says that:

When the plaint and the reply have been filed and the Trial has started, then the affidavits of both parties are unalterable.[38]

पूर्वोत्तरे निविष्टे तु विचारे संप्रवेशिते।
निर्णिक्तं तु तयोस्तत्र वचनं वादिनोर्भुगुः।। [38]

pūrvottare niviṣṭe tu vicāre saṃpraveśite।
nirṇiktaṃ tu tayostatra vacanaṃ vādinorbhuguḥ।।[38]

But the The Order, VI, Rule, 17 of the code of civil procedure says that the both the parties can apply for such amendment of their statements provided there is sufficient cause subject to court approval.

Plaintiff must file a reply on the same day to a statement or counterstatement filed by the defendant, for it is the plaintiff and not the defendant who has been determined to bring the action. Defendants may be allowed time, between three to seven days

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depending on the complexity of the case to prepare their defense. If the rejoinder is not filed in time, the judge shall impose a fine.

It is stated in *The Kautiliya Arthaśāstra* :

The maximum time allowed for a defendant to file his defense shall be three fortnights. After that, the suit shall be decreed against him with costs. If a person accused of assault does not file his defense within the permitted period, the case shall be heard on the day the period expires.[39]

त्रिपक्षादूर्ध्वमप्रतिब्रुवतः परोक्तदण्डं कृत्वा यान्यस्य द्रव्याणि स्युस्ततोअभियोक्तारं प्रतिपादयेद्, अन्यत्र वृत्युपकरणेभ्यः।
घाताभियोगमप्रतिब्रुवतस्तदहरेव पश्चात्कारः। [39]

tripakṣādūrdhvamapratibruvataḥ paroktadaṇḍaṃ kṛtvā yānyasya dravyāṇi syustatoabhiyoktāraṃ pratipādayed, anyatra vṛtyupakaraṇebhyaḥ। ghātābhiyogamapratibruv atastadahareva paścātkāraḥ।[39]

It may be noted here that the rules in this regard are made strict only to obviate the possible delays in providing justice.

With regard to the burden of proof it is stated in *smṛticandrika* that:

After the defendant files his answer viz., statement of defense to the plaint before the court, the Sabhyās or judges should examine the contents of the declarations in the plaint , and the defense statement and decide- 1) the facts proposed to be established by the respective parties; and 2) on which party the burden of proof lies. The party on whom the burden of proof lies should be called upon to substantiate the whole of his declaration by adducing evidence. This stage in a suit was called pratyakalita padah.[40]

Where litigants are contesting each other in a court of justice, the judges, after examining the answer, shall fix the burden of

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proof on either of the two parties. These rules clearly indicate that while normally the burden of proof lay on the plaintiff who had come to the court, it lay on the defendant in a case where he admitted the averments of the plaint but had set up a special plea or a plea of resjudicata. According to *Bṛhaspatismṛti* as mentioned in *Smṛticandrika:*

The Sabhyās after considering the nature of the reply should call upon one of the parties that are in court to establish his case' [41]

ये तु तिष्ठन्ति करणे तेषां सभ्यैर्विभावना।
कथयित्वोत्तरं सम्यक् दातव्यैकस्य वादिनः।।[41]

ye tu tiṣṭhanti karaṇe teṣāṃ sabhyairvibhāvanā।
kathayitvottaraṃ samyak dātavyaikasya vādinaḥ।।[41]

According to *Nāradasmṛti* as mentioned in *Dharma Kosa*:

What the claimant has fully declared word by word in the plaint, he must substantiate by adducing evidence at the third stage of the case. [42]

पूर्वपादे हि लिखितं यथाऽक्षरमशेषतः।
अर्थी तृतीयपादे तु क्रियया प्रतिपादयेत्।।[42]

pūrvapāde hi likhitaṃ yathā'kṣaramaśeṣataḥ।
arthī tṛtīyapāde tu kriyayā pratipādayet।।[42]

Section 102 of the Indian Evidence Act says that the burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side. According to *Smṛticandrika*:

Where the defendant has denied the allegations mentioned in the plaint by means of a special plea. (pratyavaskandana), it becomes incumbent on him to prove his assertions, and he is then placed in the position of a claimant. [43]

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According to *Bṛhaspatismṛti*:

The plaintiff shall prove his declaration and the defendant, his special plea; victory in a previous trial shall be proved by the document recording that victory (Jayapatra).[44]

प्रतिज्ञां भावयेद्वादी प्रत्यर्थी कारणं तथा।
प्राग्वृत्तवादी विजयं जयपत्रेण भावयेत्।।[44]

pratijñāṃ bhāvayedvādī pratyarthī kāraṇaṃ tathā।
prāgvṛttavādī vijayaṃ jayapatreṇa bhāvayet।।[44]

According to *Nāradasmṛti* as mentioned in *Vyavahāra Cintāmaṇi:*

In the case of a former judgment and the statement of an exception the burden of proof is upon the defendant; in the case of a statement of denial, however, upon the plaintiff; in the case of a confession there is none.[45]

प्राज्ञ्यायकारणोक्तौ तु प्रत्यर्थी निर्दिशेत् क्रियाम्।
मिथ्योक्तौ पूर्ववादी तु प्रतिपत्तौ न सा भवेत्।।[45]

prājñyāyakāraṇoktau tu pratyarthī nirdiśet kriyām।
mithyoktau pūrvavādī tu pratipattau na sā bhavet।।[45]

It is stated in *Bṛhaspati smṛti* that:

One should write down in the certificate of the decree everything that originated from the legal procedure; the plaint, the reply, etc., together with the trial and the decision.[46] .

यद्वृत्तं व्यवहारात्तु पूर्वपक्षोत्तरादिकम्।
क्रयावधारणोपेतं जयपत्त्रेऽखिलं लिखेत्।।[46]

yadvṛttaṃ vyavahārāttu pūrvapakṣottarādikam।
krayāvadhāraṇopetaṃ jayapatttre'khilaṃ likhet।।[46]

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This is almost similar to the definition of a certificate of the decree given in section 11 of Civil Proceedure Code.

There is a striking similarity between Order XIV rule 1(5) of the code of civil procedure and the rule prescribed in the smṛtis on the question of issues and burden of proof. Under the said rule of the civil Procedure Code, the judge is required to examine the contents of the plaint and the written statement at the first hearing and find out the fact or law on which the parties are in dispute and it is further provided that the court may examine the parties, if necessary, to ascertain the real nature of the issues on which the two parties are at variance. Though there is no specific provision regarding settlement of issue as found in Order XIV rule 1(5) of the Civil Procedure Code, the procedure of putting questions to the plaintiff and defendant when they submit their declarations clearly indicates the process of framing the issues involved in the case.

The Trial Proper: After the respective declarations were recorded by the court and a decision regarding burden of proof was given by it, the third stage in a vyavahāra was the trial. During this stage, the parties to a case were required to adduce evidence. The fact to be established in a case was Sadhya and the means by which the fact was sought to be proved was called Pramana (evidence). In *Śukranīti* it is stated that:

The King should try law suits assisted by the Chief Justice, Amātya, brāhmaṇās and Purohitas, desisting from greed and anger, and adhering strictly to the Dharmaśāstrās The King should never try cases or hear the parties alone. Neither the King nor the judges should conduct the trial in secret. [47]

धर्मशास्त्रानुसारेण क्रोधलोभविवर्जितः।
सप्राड्विवाकःसमात्यः सब्राह्मणपुरोहितः।।

समाहितमतिः पश्येद् व्यवहाराननुक्रमात्।
नैकःपश्येच्च कार्याणि वादिनोः श्रुणुयाद्वचः।।
रहसि च नृपः प्राज्ञः सभ्याश्चैव कदाचन। [47]

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dharmaśāstrānusāreṇa krodhalobhavivarjitaḥ।

saprāḍvivākaḥsamātyaḥ sabrāhmaṇapurohitaḥ।।

samāhitamatiḥ paśyed vyavahārānanukramāt।

naikaḥpaśyecca kāryāṇi vādinoḥ śruṇuyādvacaḥ।।

rahasi ca nṛpaḥ prājñaḥ sabhyāścaiva kadācana।[47]

In *Bṛhaspatismṛti* it is stated that:

There are two kinds of trial, human and divine. The sages who expound truth divide both of them into many different types. The human trial is said to be of three kinds: Witnesses, documents and inference, the divine trial is said to be nine kinds, beginning with the balance and ending with the ordeal of Dharma.[48]

द्विप्रकारा क्रिया प्रोक्ता मानुषी दैविकी तथा।
एकैकनेकधा भिन्ना ऋषिभिस्तत्त्ववेदिभिः।।

साक्षिलेख्यानुमानं च मानुषी त्रिविधा स्मृता।
घटाया धर्मजान्ता च दैवकी नवधा स्मृता।।[48]

dviprakārā kriyā proktā mānuṣī daivikī tathā।

ekaikanekadhā bhinnā ṛṣibhistattvavedibhiḥ।।

sākṣilekhyānumānaṃ ca mānuṣī trividhā smṛtā।

ghaṭāyā dharmajāntā ca daivakī navadhā smṛtā।।[48]

When one party offers a human trial whereas the other produces a divine trial; one should accept the human trial but never the divine. As mentioned in *Vyavahāracintāmaṇi* Kātyāyana says that:

When in a dispute of men both a human trial and a divine trial are possible one should choose the former even if it only covers one part, but not the latter even if this is complete. He further says that in law-cases one should not accept a divine trial when witnesses are

available; and when there is a document, one should not accept an ordeal or witnesses.[49]

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यद्येको मानुषीं ब्रूयादन्यो ब्रूयात्तु दैविकीम्।
मानुषीं तत्र गृह्णीयान्न तु दैवीं कदाचन।।

यद्येकदेशव्यासापि क्रिया विद्येत मानुषीम्।
सा ग्राह्या न तु पूर्णापि दैविकी वदतां नृणाम्।।

क्रिया न दैविकी प्रोक्ता विद्यमानेषु साक्षिषु।
लेख्ये सति च वादेषु न स्याद्दिव्यं न साक्षिणः।।[49]

yadyeko mānuṣīṃ brūyādanyo brūyāttu daivikīm।
mānuṣīṃ tatra gṛhṇīyānna tu daivīṃ kadācana।।

yadyekadeśavyāptāpi kriyā vidyeta mānuṣīm।
sā grāhyā na tu pūrṇāpi daivikī vadatāṃ nṛṇām।।

kriyā na daivikī proktā vidyamāneṣu sākṣiṣu।
lekhye sati ca vādeṣu na syāddivyaṃ na sākṣiṇaḥ।।[49]

4.5.39 In *Yājñavalkyasmṛti* it is stated that:

After the written statement was examined and decision regarding burden of proof was given, the plaintiff should immediately furnish to the court in writing the evidence viz., list of witnesses and documents by means of which he proposes to prove the facts alleged by him.[50]

ततोऽर्थी लेखयेत्सद्यः प्रतिज्ञातार्थसाधनम्। [50]

tato'rthī lekhayetsadyaḥ pratijñātārthasādhanam। [50]

It is stated in *nāradīyamanu Saṃhitā* that:

Once a legal procedure has been decided, evidence becomes useless, unless the document or the witnesses have been referred to before.[51]

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निर्णीते व्यवहारेतु प्रमाणमफलं भवेत्।

लिखितं साक्षिणो वापि पूर्वमावेदितं न चेत्।।[51]

rṇīte vyavāhāretu pramāṇamaphalaṃ bhavet।

likhitaṃ sākṣiṇo vāpi pūrvamāveditaṃ na cet।।[51]

With regard to the intrinsic strength of the type of evidence Kātyāyana says as mentioned in *Vyavahāra Cintāmaṇi* that:

A witness is weightier than inference, a document is weightier than witnesses, and possession which is uninterrupted and held for three generations is weightier than these.[52]

अनुमानात् गुरुः साक्षी साक्षिभ्यो लिखितं गुरु।

अव्याहता त्रिपुरुषी भुक्तिरेभ्यो गरीयसी।।[52]

anumānāt guruḥ sākṣī sākṣibhyo likhitaṃ guru।

avyāhatā tripuruṣī bhuktirebhyo garīyasī।।[52]

As mentioned in *Vyavahāracintāmaṇi* Nārada says that:

No one should converse in secret with a witness summoned by his adversary; neither should he try to estrange him from the cause of his opponent by other means. He, who behaves in this way, loses the case.[53]

न परेण समुद्दिष्टानुपेयात् साक्षिणो रहः।

भेदयेच्चैव नान्येन हीयेतैवं समाचरेत्।। [53]

na pareṇa samuddiṣṭānupeyāt sākṣiṇo rahaḥ।

bhedayeccaiva nānyena hīyetaivaṃ samācaret।।[53]

Bṛhaspati says that:

When the parties come to a mutual agreement after the plaint and the reply have been entered and after the trial has been started, they should be forced to pay double the amount.[54]

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पूर्वोत्तरे निविष्टे तु विचारे सम्प्रवर्तिते।
प्रश्नमं ये मिथो यान्ति दाप्यास्ते द्विगुणं दमम्।।[54]

pūrvottare niviṣṭe tu vicāre sampravartite।
praśmamaṃ ye mitho yānti dāpyāste
dviguṇaṃ damam।।[54]

As mentioned in *Vyavahāracintāmaṇi* Kātyāyana says that:

In all law suits the king should always arrive at the decision by means of evidence, by means of circumstances, or by means of an ordeal. [55]

प्रमाणैर्हेतुना वापि दिव्येनैव तु निर्णयम्।
सर्वेष्वेव विवादेषु सदा कुर्यान्नराधिपः।।[55]

pramāṇairhetunā vāpi divyenaiva tu nirṇayam।
sarveṣveva vivādeṣu sadā kuryānnarādhipaḥ।।[55]

Appearance through representative (Niyogi): A party to litigation could appoint another person, well versed in law, to represent his case before the court. Such a person was called a Niyogi. Nārada smṛti as mentioned in *Dharmakośa* says that:

If one deputed by the claimant, or a person chosen as his representative by the defendant, speaks for his client in the court, the victory or defeat concerns the party himself, and not of the representative.[56]

अर्थिना संनियुक्तो वा प्रत्यर्थिप्रहितोऽपि वा।
यो यस्यार्थे विवदते तयोर्जयपराजयोः।।[56]

arthinā saṃniyukto vā pratyarthiprahito'pi vā।
yo yasyārthe vivadate tayorjayaparājayoḥ।।[56]

Representatives have to be appointed by the plaintiff and defendant who do not know the legal procedure or who

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are busy with other affairs, or who are not good speakers. It is stated in *Śukranīti* that:

Only a person well versed in the substantive law and procedural law is entitled to represent parties in a court, and take remuneration for his services. The theory underlying the appointment of the pleaders appears to be that for the time being they become the defendant's and complainant's other selves so to speak, become in fact the defendants and complainants. The proxy becomes the original by a sort of legal fiction for the purpose of answering queries and asking questions. A person is liable to be punished if he, without knowing the law, accepted to represent a party in a case. The lawyer's fees is one-sixteenth of the interests involved i.e., the value defended or realized. Or he is entitled to get his remuneration to the extent of 1/20, 1/40th, 1/80th, part of the suit claim, and the remuneration should be inversely proportionate to the suit claim. Having appeared for a party if the Niyogi acted otherwise to the prejudice of his client owing to greed, he was liable to be punished.[57]

व्यवहारानभिज्ञेन ह्यन्यगार्याकुलेन च।
प्रत्यर्थिनाअथिना तज्ज्ञः कार्यः प्रतिनिधिस्तदा।।

धर्मज्ञो व्यवहारज्ञो नियोक्तव्योऽन्यथा न हि।
अन्यथा भृतिगृह्णन्तं दण्डयेच्च नियोगिनम्।

नियोगितस्यापि भृतिं विवादात् षोडशांशिकीम्।
विंशत्यंशां तदर्धां वा च तदर्धिकाम्।।

तथा द्रव्याधिकं कार्यं हीना हीना भृतिस्तथा।।
लोभेन त्वन्यथा कुर्वन् नियोगी दण्डमर्हति। [57]

vyavahārānabhijñena hyanyagāryākulena ca।
pratyarthināathinā tajjñaḥ kāryaḥ pratinidhistadā।।

dharmajño vyavahārajño niyoktavyo'nyathā na hi।
anyathā bhṛtigṛhṇantaṃ daṇḍayecca niyoginam।

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niyogitasyāpi bhrtim vivādāt sodaśāmśikīm।
viṃśatyaṃśāṃ tadardhāṃ vā ca tadardhikām॥
tathā dravyādhikaṃ kāryaṃ hīnā hīnā bhṛtistathā॥
lobhena tvanyathā kurvan niyogī daṇḍamarhati।[57]

These provisions correspond to Order III of the C.P.C. viz., providing for being represented through a recognized agent viz., power of attorney holder; and providing for appointment of pleaders. These provisions indicate that the ancient law givers had realized and recognized the necessity and the right of the parties to litigation to be represented by another person knowing the law. Only a person qualified in the Dharmaśāstrās , i.e., the eighteen titles of law, and other miscellaneous provisions which regulated the rights and liabilities of parties as also the procedural law, had the right to appear as a Niyogi viz., advocate or pleader. These provisions correspond to the Advocate's Act which entitles only advocates qualified in substantive and procedural law and duly enrolled to appear before any court, and plead for parties to a dispute. It also provides for the punishment of advocates by the Bar Council for professional misconduct.

Grounds for defeat without trial: The smṛtis specified five grounds which would bring about the defeat of a party to litigation. In this regard *smṛticandrika* says that:

i) A party who resorts to a totally different plea than the one pleaded already is called a Anyavadi ,ii) One who shuns trial is a Kriyadvesi. iii) The man who fails to appear before the court is a Nopasthatha. iv) One who, having appeared before the court, fails to reply the questions asked i.e., remains silent, is a Niruttara. v) The person who absconds after receiving summons is a Ahutavipalayi. A person who, after giving up the case pleaded in his declaration, resorts to plead a different case is also called hīnavādi

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and he shall lose his case. It is also provided for the imposition of fine on a hīnavādi.[58]

अन्यवादी क्रियाद्वेषी नोपस्थाता निरुत्तरः।
आहूतविपलायी च हीनः पञ्चविधः स्मृतः।।

पूर्ववादं परित्यज्य योऽन्यमालम्बते पुनः।
वादसंक्रमणाज्ज्ञेयो हीनवदी स वै नरः।।[58]

anyavādī kriyādveṣī nopasthātā niruttaraḥ।
āhūtavipalāyī ca hīnaḥ pañcavidhaḥ smṛtaḥ।।

pūrvavādaṃ parityajya yo'nyamālambate punaḥ।
vādasaṃkramaṇājñjñeyo hīnavadī sa vai naraḥ।।[58]

One should not alter his statement at a later stage to the prejudice of the other if the other person had already acted upon the said statement. This is similar to the principle of estoppel dealt under section 115 of the Indian Evidence Act.

Judgement: Every judicial proceeding had to culminate by the rendering of the judgment by the king or the chief justice or the court, as the case might be. After the conclusion of evidence on both sides, the King or the judges, as the case might be, were required to consider the whole case, i.e., the pleadings and the evidence adduced and to deliver judgment according to law and customs, under their signature. It is stated in *Dharmakośa* that:

Every judge of the court should deliver his fair opinion discarding love and hatred.[59]

युक्तरूपं ब्रुवन् सभ्यो नाप्नुयाद द्वेषकिल्बिषे।[59]

yuktarūpaṃ bruvan sabhyo nāpnuyāda dveṣakilbiṣe।[59]

The provisions, regulating the writing of the judgment is enlightening and throws light on the advance made in jurisprudence and, in particular, in procedural law. With regard to the content and

the tenor of the Judgement It is stated in *'History of Dharmaśāstrās'* that:

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Jayapatra is one which incorporates: i) a brief statement of the plaint and the answer; ii) the evidence adduced by the parties; iii) the discussion on the issues involved; iv) the consideration of the arguments advanced by the parties; v) the law applicable to the case; vi) the opinion of Sabhyās (judges) vii) the decision given by the chief justice and other judges; and viii) the royal seal. Similar provisions are found in other texts. Under the signature of the Chief Justice (Pradvivaka) and bearing the royal seal (Rajamudra), the Jayapatra should be given to the victorious party evidencing his victory.[60]

पूर्वोत्तरे क्रियापादं प्रमाणं तत्परीक्षणम्।
निगदं स्मृतिवाक्यं च यथासभ्यं विनिश्चितम्।।

एतत्सर्वं समासेन जयपत्रेऽभिलेखयेत्।।
सकलं पूर्ववादं च सोत्तरं सक्रियं तथा।

सावधारणकं चैव तज्ज्ञेयं जयपत्रकम्।।
प्राड्विवाकादिहस्ताङ्क मुद्रितं राजमुद्रया। सिद्धेर्थे वादिनो दद्याज्जयिने जयपत्रकम्।। [60]

pūrvottare kriyāpādaṃ pramāṇaṃ tatparīkṣaṇam।
nigadaṃ smṛtivākyaṃ ca yathāsabhyaṃ viniścitam।।

etatsarvaṃ samāsena jayapatre'bhilekhayet।।
sakalaṃ pūrvavādaṃ ca sottaraṃ sakriyaṃ tathā।

sāvadhāraṇakaṃ caiva tajñjñeyaṃ jayapatrakam।।
prāḍvivākādihastāṅka mudritaṃ rājamudrayā।
siddherthe vādino dadyājjayine jayapatrakam।। [60]

The above provisions are remarkable in all respects. They cover every aspect regarding the requirements in respect of the

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contents of judgment. They compare well with the contents of the Order XX rule 4 of the Code of Civil Procedure, which is the law now in force regulating the manner of writing judgment in civil cases. Bṛhaspati says that:

One should not decide law suits on the basis of the prescriptions of the sacred law only; if an investigation is devoid of reason, it violates the sacred law.[61]

केवलं शास्त्रमाश्रित्य न कर्तव्यो विनिर्णयः।
युक्तिहीने विचारे तु धर्महानिः प्रजायते।। [61]

kevalaṃ śāstramāśritya na kartavyo vinirṇayaḥ।
yuktihīne vicāre tu dharmahāniḥ prajāyate।। [61]

According to Kautilya, in determining a suit in favour of one or the other party, the following shall be taken as strengthening a party's case:

A (distinctly) seen offence, a voluntary admission, straightforwardness in questions (and answers) to one's own and the opposite party, reasoning, and oath lead to a decision in a case. In case of contradiction between an earlier and a later statement, in case of the blameworthiness of witnesses and in case of escape from the custody of the prison-guard, loss of suit shall be decreed.[62]

दृष्टदोषः स्वयंवादः स्वपक्षपरपक्षयोः।
अनुयोगार्जवं हेतुः शपथश्चार्थसाधकः।।

पूर्वोत्तरार्थव्याघाते साक्षिवक्तव्यकारणे।
चारहस्ताश्च निष्पाते प्रदेष्टव्यः पराजयः।।[62]

dṛṣṭadoṣaḥ svayaṃvādaḥ svapakṣaparapakṣayoḥ।
anuyogārjavaṃ hetuḥ śapathaścārthasādhakaḥ।।

pūrvottarārthavyāghāte sākṣivaktavyakāraṇe।
cārahastāśca niṣpāte pradeṣṭavyaḥ parājayaḥ।।[62]

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He further says that the following shall also be adequate grounds for finding a suit against one of the parties:

A (party to a suit) who gives up the dispute as put down and changes to another dispute, does not corroborate the first statement by a subsequent matter, remains (silent) after challenging an unchallengable statement of the othere (party), after making an affirmation does not indicate the evidence when asked to do so, indicates weak evidence or false evidence, produces evidence other than that indicated, when evidence is produced denies a statement in the matter saying 'it is not so', does not accept what is confirmed by witnesses, talks secretly with witnesses in a place where no conversation is allowed, these are reasons for loss of suit.[63]

निबद्धं वादमुत्सृज्यान्यं वादं संक्रामति, पूर्वोक्तं पश्चिमेनार्थेन नाभिसंधत्ते, पर वाक्यमनभिग्राह्यमभिग्राह्यावतिष्ठते, प्रतिज्ञाय देशं निर्दिशेत्युक्ते न निर्दिशति, हीनदेशमदेशं वा निर्दिशति, निर्दिष्टाद्देशादन्यं देशमुपस्थापयति, उपस्थिते देशेअर्थवचनं नैवमित्यपव्ययते, साक्षिभिरवधृतं नेच्छति, असंभाष्ये देशे साक्षिभिर्मिथः संभाषते इति परोक्तहेतवः।[63]

nibaddhaṃ vādamutsṛjyānyaṃ vādaṃ saṃkrāmati, pūrvoktaṃ paścimenārthena nābhisaṃdhatte, paravākyamanabhigrāhyamabhigrāhyāvatiṣṭhate, pratijñāya deśaṃ nirdiśetyukte na nirdiśati, hīnadeśamadeśaṃ vā nirdiśati, nirdiṣṭāddeśādanyaṃ deśamupasthāpayati, upasthite deśearthavacanaṃ naivamityapavyayate, sākṣibhiravadhṛtaṃ necchati, asaṃbhāṣye deśe sākṣibhirmithaḥ saṃbhāṣate iti paroktahetavaḥ।[63]

As mentioned in *Vyavahāra Cintāmaṇi*, Vyāsa says that:

The bases for judgment are eight in number, viz., three types of human evidence, i.e., pramana: i-oral; ii) documentary, iii) possession; and iv) logical inference; v) the usages of the country;

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vi) oaths or ordeals, vii) the royal edict and viii) admission of the parties. The valid means of proof are said to be of three kinds: a document, witnesses and possession. By motive the wise mean inference and logical speculation.[64]

प्रमाणैर्हेतुचरितैः शपथेन नृपाज्ञया।
वादिसंप्रतिपत्त्या वा निर्णयोऽष्टविधः स्मृतः।।

लिखितं साक्षिणो भुक्तिः प्रमाणं त्रिविधं स्मृतम्।
अनुमानं विदुर्हेतुस्तर्कश्चेति मनीषिणः।
देशस्थितिः पूर्वकृताचरितं समुदाहृतम्।।[64]

pramāṇairhetucaritaiḥ śapathena nṛpājñayā।
vādisaṃpratipattyā vā nirṇayo'ṣṭavidhaḥ smṛtaḥ।।

likhitaṃ sākṣiṇo bhuktiḥ pramāṇaṃ trividhaṃ smṛtam।
anumānaṃ vidurhetustarkaśceti manīṣiṇaḥ।
deśasthitiḥ pūrvakṛtācaritaṃ samudāhṛtam।।[64]

Local rules established for a long time are called customs. Oaths differ according to the nature of the case, truth, the balance, etc. It is stated in *smṛticandrika* that:

In absence of these the wise prescribe a decision by a royal decree. Where no document exists, nor possession, nor also witnesses, nor resort to ordeal is possible, then the king is the authority to decide. This rule is similar to the rule of acting according to 'Justice' equity and good conscience'. It is for the King to impose penalty on the guilty and give document of victory to the winner of the case.[65]

लेख्यं यत्र न विद्यते न भुक्तिर्न च साक्षिणः।
न च दिव्यावतारोऽस्ति प्रमाणं तत्र पार्थिवः।। [65]

lekhyaṃ yatra na vidyate na bhuktirna ca sākṣiṇaḥ।
na ca divyāvatāro'sti pramāṇaṃ tatra pārthivaḥ।। [65]

Dharma Kosa says:

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The person found guilty by the judges shall be punished by the King. The victorious party shall receive a document recording his victory written in an appropriate language.[66]

सभ्यैरेव जितः पश्चाद्राज्ञा शास्यः स्वशास्त्रतः।
जयिने चापि देयं स्याद् यथावज्जयपत्रकम्।।[66]

sabhyaireva jitaḥ paścādrājñā śāsyaḥ svaśāstrataḥ।
jayine cāpi deyaṃ syād yathāvajjayapatrakam।।[66]

Nirnayapatra or judgement by people's courts: Jayapatra written with all the formalities, as prescribed in the Smṛtis, had to be delivered by royal courts. P.V. Kane in his treatise *History of Dharma Sasrastras* mentions that:

In the case of people's courts and domestic tribunals also a document incorporating the decision of such courts had to be given. This was called Nirnayapatra.[67]

कुलादिभिर्निर्णये जयपत्राभावन्निर्णयपत्रं तत्र कार्यं प्रत्तपत्रमिति यावत्।[67]

kulādibhirnirṇaye jayapatrābhāvannirṇayapatraṃ tatra kāryaṃ prattapatramiti yāvat।[67]

Execution of orders: As mentioned in *Vyavahāra Cintāmaṇi* Kātyāyana says that:

Plaintiff should be duly restored with the right established by him, with compliments by the King. He should also be given a document to that effect under his own (King's) signature.[68]

सिद्धेनार्थेन संयोज्यो वादी सत्कारपूर्वकम्।
लेख्यं स्वहस्तसंयुक्तं तस्मै दद्यात्तु पार्थिवः।। [68]

siddhenārthena saṃyojyo vādī satkārapūrvakam।
lekhyaṃ svahastasaṃyuktaṃ tasmai
dadyāttu pārthivaḥ।।[68]

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In this regard the *Kautilīya Arthaśastra* also says:

The successful plaintiff may, after paying the fine (on behalf of the losing defendant) make the defendant work for him . Or the defendant may hypothecate his property to the plaintiff (until the degree amount is paid), or may get brāhmins to perform, at his cost, special rituals to ward off evil on behalf of the (successful) plaintiff.[69]

अभियोक्ता दण्डं दत्वा कर्म कारयेत्।35, आर्धि वा स कामं प्रवेशयेत्।36, रक्षोध्नरक्षितं वा कर्मणा प्रतिपादयेद्, अन्यत्र ब्राह्मणात्।[69]

abhiyoktā daṇḍaṃ datvā karma kārayet। ārdhi vā sa kāmaṃ praveśayet।, rakṣodhnarakṣitaṃ vā karmaṇā pratipādayed, anyatra brāhmaṇāt।[69]

Punarnyaya (Review of judgement or denovo trial): With regard to the review of judgement or denovo trial *smṛticandrika* says:

Where a party has lost his cause on account of the dishonesty of witnesses or Sabhyās, the party could claim a retrial.[70]

साक्षिसभ्यावसन्नानां दूषणे दर्शनं पुनः। स्वाचैव जितानां तु नोक्तः पौनर्भवो विधिः।। [70]

sākṣisabhyāvasannānāṃ dūṣaṇe darśanaṃ punaḥ।
svācaiva jitānāṃ tu noktaḥ paunarbhavo vidhiḥ।। [70]

In *Yājñavalkyasmṛti* and in *Dharmakośa* it is stated that:

If a man is of the opinion that his cause has been decided and punishment or order declared in any way contrary to justice, he may have the cause tried once again, subject to payment of twice the amount of fine if again defeated. No such retrial is permissible if he has been defeated by his own conduct in producing false witnesses or forged documents. When a law suit has been decided, evidence becomes useless, unless a fresh document or witness can be produced, which or who had not been announced at the stage of the earlier trial.[71]

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यो मन्येता जितोऽस्मीति न्यायेनापि परजित:। तमायन्तं पुनर्जित्वा
दापयेद् द्वगुणं दमम्।।

निर्णिक्तव्यवहारेषुप्रमाणमफलंभवेत्।
लिखितं साक्षिणो वाऽपि पूर्वमावेदितं न चेत्।। [71]

yo manyetā jito'smīti nyāyenāpi parājitaḥ।
tamāyantaṃ punarjitvā dāpayed dvaguṇaṃ damam।।

nirṇiktavyavahāreṣupramāṇamaphalaṃbhavet।
likhitaṃ sākṣiṇo vā'pi pūrvamāveditaṃ na cet।। [71]

Appellate jurisdiction of the king: The provision and grounds for review show that the aim of the procedural law was to ensure that justice was rendered in favour of the party who had really suffered an injury. The power of the King contained in the above provision corresponds to the power of the Supreme Court of India under Article 136 of the Constitution. Under this Article the Supreme Court has power to entertain appeal by granting special leave against the judgment of all courts and tribunals in India. But according to *Manusmṛti:*

"In whatever case, whatever judgment has been passed in accordance with the rulings of Dharmasastra or whatever punishment has been awarded the king should not set aside arbitrarily.[72]

तीरितं चानुशिष्टं च यत्र क्वचन यद्भवेत्।
कृतं तद्धर्मतो विद्यान्न तद्भूयो निवर्तयेत्।। [72]

tīritaṃ cānuśiṣṭaṃ ca yatra kvacana yadbhavet।
kṛtaṃ taddharmato vidyānna tadbhūyo nivartayet।। [72]

He was under a duty to confirm the judgment if it was rendered in accordance with law. Law of evidence is an important segment in the trial as the judges have to rely on it to ascertain the truth. What constitute law of evidence and about its admissibility and related details are dealt in the next chapter.

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End Notes

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v) Law of Evidence

Law of Evidence:

The rules with regard to the admissibility or otherwise of the evidence in a trial are dealt in smṛtis. The main object of the law of evidence is to help the courts to ascertain the truth. After confirming the propriety of the statements of plaintiff and defendant and after fixing the burden of proof court has to proceed to record the evidence. To regulate and examine the admissibility or inadmissibility of evidence adduced by the parties and to approve their evidentiary value, the Smṛti texts laid down specific rules of evidence and these provisions constituted the law of evidence.

Facts pleaded to be proved: The rule laid down by the Smṛtis was that the plaintiff or the defendant who asserted the existence of facts should adduce evidence to prove word by word the facts in the issue. *Bṛhaspatismṛti* says that:

The plaintiff shall prove his declaration and the defendant, his special plea. Victory in a previous trial shall be proved by the document recording that victory.[1]

प्रतिज्ञां भावयेद्वादी प्रत्यर्थी कारणं तथा।
प्राग्वृत्तवादी विजयं जयपत्रेण भावयेत्।। [1]

pratijñāṃ bhāvayedvādī pratyarthī kāraṇaṃ tathā।
prāgvṛttavādī vijayaṃ jayapatreṇa bhāvayet।। [1]

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The above rule equally applies to a criminal case. All the allegations are required to be proved by the complainant or the State and the accused has to prove only any special plea taken by him.

Classification of evidence: The evidence or proof that may be adduced by a party for proving the case put forward by him is of two kinds: i) Human evidence viz., documents, witnesses and possession or in other words, documentary, oral and possessory evidence established by oral or documentary evidence. ii) The divine evidence or the proof of his case by a party by undergoing an ordeal.

These two models of evidence, viz., documentary and oral, are well known. The other mode of proof by which a party could prove his pleas was by undergoing one of the various types of ordeals. This method of proof was in vogue in all ancient societies as well as in India. It was called Divya mode of proof. Having recognized these three means of proof, the Smṛtis made specific provisions for regulating the evidence as also the order of preference between them. With regard to the order of preference among the three kinds of evidence, it is said in *Yājñavalkyasmṛti* that:

The method of proving the case of a party by ordeal should be resorted to only when human evidence documentary, oral and possessory evidence established by oral or documentary evidence is not available.[2]

प्रमाणं लिखितं भुक्तिः साक्षिणश्चेति कीर्तितम्।
एषामन्यतमाभावे दिव्यान्यतममुच्यते।।[2]

pramāṇaṃ likhitaṃ bhuktiḥ sākṣiṇaśceti kīrtitam।
eṣāmanyatamābhāve divyānyatamamucyate।।[2]

As stated in *Dharmakośa* Pitamaha observes that:

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In disputes regarding immovable property, ordeal should be rejected and only documentary and possessory evidence are to be accepted. In the case of crimes of violence and such other disputes, wherever there is no possibility of existence of witnesses, Ordeal method should be resorted to.[3]

स्थावरेषु विवादेषु दिव्यानि परिवर्जयेत्।
साक्षिभिर्लिखितेनाथ भुक्त्या चैतान् प्रसाधयेत्।।

यस्मिन् यस्मिन् विवादे तु साक्षिणां नास्ति संभवः।[3]
साहसेषु च सर्वेषु तत्र दिव्यानि दापयेत्।।[3]

sthāvareṣu vivādeṣu divyāni parivarjayet।
sākṣibhirlikhitenātha bhuktyā caitān prasādhayet।।

yasmin yasmin vivāde tu sākṣiṇāṃ nāsti saṃbhavaḥ।
sāhaseṣu ca sarveṣu tatra divyāni dāpayet।।[3]

The fundamental rule regarding the admissibility of oral evidence is stated in the Smṛtis. Evidence of what had actually been seen or heard by a person is admissible. If the defendant admits the claim made against him before the judges the case ends there itself. If the claim is not admitted, then the judgment shall be based on the evidence of trustworthy witnesses, who shall be persons known for their honesty or those approved by the Court. The *Kautiliya Arthaśāstra* says:

In case of admission (of the claim) it is best. In case of non admission, however, witnesses shall decide, those who, are trustworthy, honest or approved, three at least in number. Or, two (will suffice) if both parties agree, but never a single witness in the case of debt.[4]

संप्रतिपत्तावुत्तमः।25 असंप्रतिपत्तौ तु साक्षिणः प्रमाणं प्रात्ययिकाः
शुचयोअनुमता वा त्रयोअवरार्ध्याः।
पक्षानुमतौ वा द्वौ, ऋणं प्रति न त्वेवैकः। [4]

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saṃpratipattāvuttamaḥ।25 asaṃpratipattau tu sākṣiṇaḥ pramāṇaṃ prātyayikāḥ śucayoanumatā vā trayoavarārdhyāḥ। pakṣānumatau vā dvau, ṛṇaṃ prati na tvevaikaḥ।[4]

Kātyāyana as mentioned in *Vyavahāra Cintāmaṇi* makes it clear that:

The statement of a witness as to whatever has been perceived or experienced by him because of his being present at the time of the transaction should be accepted and not otherwise.[5]

अर्थिप्रत्यर्थिसान्निध्यादनुभूतं तु यद्भवेत्।
तद्ग्राह्यं साक्षिणो वाक्यमन्यथा न बृहस्पतिः।।[5]

arthipratyarthisānnidhyādanubhūtaṃ tu yadbhavet।
tadgrāhyaṃ sākṣiṇo vākyamanyathā na bṛhaspatiḥ।।[5]

In sabhāparva of *Mahābhārat* it is stated that:

A proper witness is one who has himself either seen or heard or experienced the matter in dispute. This means that the evidence of a witness must be direct and should not be what is called hearsay. It is also observed that a witness who does not speak truth will suffer from unhappiness.[6]

तानि सर्वाणि दुःखानि प्राप्नोति वितथं बृवन्।
समक्षदर्शनात् साक्षी श्रवणाच्चेति धारणात्।।

तस्मात् सत्यं बृवन् साक्षी धर्मार्थाभ्यां न हीयते।[6]

tāni sarvāṇi duḥkhāni prāpnoti vitathaṃ bṛvan।
samakṣadarśanāt sākṣī śravaṇācceti dhāraṇāt।।

tasmāt satyaṃ bṛvan sākṣī dharmārthābhyāṃ na hīyate।[6]

Explaining the nature of the evidence *Manusmṛti* and *'History of Dharmaśāstra'* observe that:

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In a matter which is an object of eyes, eye-witness should be given importance. If it is an object of hearing the oral statement can be relied upon. A witness speaking truth never suffers in regard of Dharma and Artha. "Hearsay evidence occurs when a person who hears from another that has himself heard something from another comes forward as a witness and that hearsay is no legal evidence."[7]

समक्षदर्शनात्साक्ष्यं श्रवणाच्चैव सिध्यति।
तत्र सत्यं बृवन्साक्षी धर्मार्थाभ्यां न हीयते।।

समक्षदर्शनात्साक्षादनुभावच्छ्रवणाच्च समक्षशब्दानुशङ्गा कर्तव्यः।
यत्कुतश्चिदेकेन श्रूयते ततोन्येन तत्परंपराश्रुतं तेन परंपराश्रावि न साक्षि।[7]

samakṣadarśanātsākṣyaṃ śravaṇāccaiva sidhyati।
tatra satyaṃ bṛvansākṣī dharmārthābhyāṃ na hīyate।।

samakṣadarśanātsākṣādanubhāvacchravaṇācca
samakṣaśabdānuśaṅgā kartavyaḥ।
yatkutaścidekena śrūyate tatonyena tatparaṃparāśrutaṃ
tena paraṃparāśrāvi na sākṣi।[7]

A witness is one who has himself either seen or heard or experienced the matter in dispute. This means that the evidence of a witness must be direct and should not be what is called hearsay.

Explaining the circumstances in which the heresay evidence can be recognized as valid it is stated in *Vishnu Dharma sūtrās* and *Kātyāyanasmṛti* **as per** *History of Dharmaśāstra*:

If an appointed witness has gone abroad or has died, a person who had heard him may give evidence as to what he had heard from him. And when it is impossible to bring witnesses because they reside in a foreign country, evidence taken in writing before a man learned in the three Vedās and sent by him should be read in deciding the cause.[8]

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उद्दिष्टसाक्षिणि मृते देशान्तरगते वा तदभिहितज्ञातारः प्रमाणम्।।

अशक्य आगमो यत्र विदेशप्रतिवादिनां।

त्रैविद्यप्रहितं तत्र लेख्यं साक्ष्यं प्रदापयेत्।।

uddiṣṭasākṣiṇi mṛte deśāntaragate vā
tadabhihitajñātāraḥ pramāṇam।।

aśakya āgamo yatra videśaprativādināṃ।

traividyaprahitaṃ tatra lekhyaṃ sākṣyaṃ pradāpayet।।[8]

This corresponds to the modern rule of taking evidence on commission as provided for in Order 26 rules 4, 4-A and 5 of the code of civil procedure. With regard to the invalidity of evidence it is mentioned in *Manusmṛti* that:

The statement of a witness motivated by greed, infatuation, fear, friendship, lust, anger, ignorance and innocence is taken to be false.[9]

लोभान्मोहाद्भयान्मैत्रात्कामात्क्रोधात्तथैव च।

अज्ञानाद्बालभावाच्च साक्ष्यं वितथमुच्यते।।[9]

lobhānmohādbhayānmaitrātkāmātkrodhāttathaiva ca।
ajñānādbālabhāvācca sākṣyaṃ vitathamucyate।।[9]

Katyayanasmṛti as mentioned in *Vyavahāra Cintāmaṇi* says that:

One should not refuse evidence because it is untrue, but only on the basis of a defect. In case of a false charge the party should be punished and he fails to establish his probandum.[10]

नातथ्येन प्रमाणं तु दोषेणैव तु दूषयेत्।

मिथ्याभियोगे दण्ड्यः स्यात् साद्यार्धर्माच्च हीयते।।[10]

nātathyena pramāṇaṃ tu doṣeṇaiva tu dūṣayet।
mithyābhiyoge daṇḍyaḥ syāt sādyādharmācca hīyate।।[10]

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About the number of witnesses it is stated in *Dharmakośa* and *Yājñavalkyasmṛti* that:

Under no circumstances should a single witness be admitted. Wheras (Yajnavalkyasmṛti says that) with the consent of both parties, even one person becomes sufficient as a witness, if he is proficient in the duties laid down in the śrutis and smṛtis. In the cases relating to adultery, theft, assault, defamation and crimes, all men can be admitted as witnesses.[11]

एकश्चासाक्षी।। उभयानुमतः साक्षी भवत्येकोऽपि धर्मवित्।
सर्वःसाक्षी संग्रहणे चौर्यपारुष्यसाहसे।। [11]

ekaścāsākṣī।। ubhayānumataḥ sākṣī bhavatyeko'pi dharmavit।
sarvaḥsākṣī saṃgrahaṇe cauryapārūṣyasāhase।। [11]

Section 134 of the Indian Evidence Act says that no particular number of witnesses shall in any case be required for the proof of any fact.

The school of Manu recommends a fine of ten times the amount involved for testifying falsely. The followers of Bṛhaspati recommend that a witness, who, by testimony is responsible for miscarriage of justice, shall be put to death. Kautilya disagrees with this view and states:

In case of divergent replies to questions through the folly of witnesses themselves, they shall be fined the lowest, middle most and highest fines, with regard to (testimony about) place, time and the matter (respectively), say the followers of Usanas. False witness, who bring into being a non-existent thing or ruin an existing thing, shall pay ten times that (thing) as fine, say the followers of Manu. Or, if through folly they lead to a wrong judgement, death by torture (is to be the punishment), say the followers of Bṛhaspati. 'No', says Kautilya. For, witnesses have to testify to what is the truth. For those

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who do not testify (to the truth) the fine is twenty-four panas, half that for those who do not speak out.[12]

कूटसाक्षिणो यमर्थमभूतं कुर्युर्भूतं वा नाशयेयुस्तद्दशगुणं दण्डं दद्युः इति मानवाः।45 बालिश्याद्वा विसंवादयतां चित्रो धातः इति बार्हस्पत्याः।46 नेति कौटिल्यः।47 धृवं हि साक्षिभिः श्रोतव्यम्।48 अशृण्वतां चतुर्विंशतिपणो दण्डः, ततोअर्धमब्रुवाणानाम्। [12]

kūṭasākṣiṇo yamarthamabhūtaṃ kuryurbhūtaṃ vā nāśayeyustaddaśaguṇaṃ daṇḍaṃ dadyuḥ iti mānavāḥ। 45 bāliśyādvā visaṃvādayatāṃ citro dhātaḥ iti bārhaspatyāḥ। 46 neti kauṭilyaḥ।47 dhṛvaṃ hi sākṣibhiḥ śrotavyam।48 aśṛṇvatāṃ caturviṃśatipaṇo daṇḍaḥ, tatoardhamabruvāṇānām।[12]

According to Yājñavalkya that:

if the evidence is contradictory, the testimony of the majority prevails; if the witnesses are equally divided, the testimony of the virtuous; and if the virtuous are equally divided, the testimony of the most virtuous is to be admitted.[13]

द्वैधे बहूनां वचनं समेषु गुणिनां तथा।
गुणिद्वैधे तु वचनं ग्राह्यं येगुणवत्तमाः।। [13]

dvaidhe bahūnāṃ vacanaṃ sameṣu guṇināṃ tathā।
guṇidvaidhe tu vacanaṃ grāhyaṃ yeguṇavattamāḥ।।[13]

Exhortation to the witness: Great sanctity was attached to the act of giving oral evidence before the courts. For this purpose, the smṛtis provided that after administering the oath and before recording the evidence, the judges should impress upon the witnesses the greatness of telling the truth, and of the sin which they would incur by giving false evidence. The smṛti texts condemned the act of giving false evidence in the strongest terms. In fact, the highest punishment i.e., capital punishment, was prescribed for the offence of giving false evidence. Elaborate rules were prescribed

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for warning or exhorting the witnesses before they give evidence. Bṛhaspati says that:

A witness should be exhorted by judges acquainted with law, by means of words which praise truth and drive away falsehood. He warns that whatever religious merit has been acquired by the witness from the time of his birth to the time of his death all that will be lost by telling falsehood.[14]

सत्यप्रशंसावचनैरनृतस्यापवर्जनैः।
सभ्यैः सम्भोधनीयास्तु धर्मशास्त्र प्रवेदिभिः।।

आजन्मनश्चा मरणात् सुकृतं यत्वयार्जितम्।
तत्सर्वं नाशमायाति अनृतस्याभिशंसनात्।।[14]

satyapraśaṃsāvacanairanṛtasyāpavarjanaiḥ।
sabhyaiḥ sambhodhanīyāstu dharmaśāstra pravedibhiḥ।।

ājanmanaścā maraṇāt sukṛtaṃ yatvayārjitam।
tatsarvaṃ nāśamāyāti anṛtasyābhiśaṃsanāt।।[14]

Nārada as mentined in *Vyavahāra Cintāmaṇi* also observes that:

The truth is the greatest gift, truth is the most efficacious kind of austerity, truth is the highest duty in the world, and thus it has been revealed to us. He further says that there is no higher virtue than veracity, nor heavier crime than falsehood. A man must speak truth therefore, particularly when he has been appointed to give evidence.[15]

सत्यमेव परं धाम सत्यमेव परं तपः।
सत्यमेव परो धर्मो लोकानामिति निश्चितम्।।

नास्ति सत्यात्परो धर्मो नानृतात्पातकं परम्।
साक्षिधर्मे विशेषण सत्यमेव वदेत्ततः।। [15]

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satyameva paraṃ dhāma satyameva paraṃ tapaḥ।

satyameva paro dharmo lokānāmiti niścitam।।

nāsti satyātparo dharmo nānṛtātpātakaṃ param।

sākṣidharme viśeṣaṇa satyameva vadettataḥ।।[15]

Kātyāyanasmṛti as stated in *Vyavahāra Cintāmaṇi* says that:

After having summoned the witnesses and having bound them strongly by oath, the judges should question each witness separately. The King should not delay in examining the witnesses. A serious defect, namely, miscarriage of justice, would result owing to delay in examination of witnesses.[16]

आहूय साक्षिणः पृच्छेन्नियम्य शपथैर्भृशम्।
समस्तान् विदिताचारान् विज्ञातार्थान् पृथक् पृथक्।।

न कालहरणं कार्यं राज्ञा साक्षिप्रभाषणे।
महान् दोषो भवेत्कालाद् धर्मव्ययावृत्तिलक्षणः।।[16]

āhūya sākṣiṇaḥ pṛcchenniyamya śapathairbhṛśam।

samastān viditācārān vijñātārthān pṛthak pṛthka।।

na kālaharaṇaṃ kāryaṃ rājñā sākṣiprabhāṣaṇe।

mahān doṣo bhavetkālād dharmavyayāvṛttilakṣaṇaḥ।।[16]

This rule is a very salutary one worthy of emulation as witnesses are likely to forget important links or facts as time passes.

With regard to the punishment of false witnesses *Manusmṛti* **says that:**

If motivating cause is greed, the witness should be fined for one thousand panas; if it is caused by infatuation the punishment should be as prescribed for, first Sahasa. If it is due to fear then the liar should be punished as in case of middle Sahasa and if it is caused by friendship the witness should be punished four times as in first Sahas. Manu has

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stated that two hundred fifty panas for first sahasa, five hundred panas for middle sahasa and one thousand panas for superior sahasa.[17]

लोभात्सहस्रं दण्ड्यस्तु मोहात्पूर्वंतु साहसम्।
भयाद्वौ मध्यमौ दण्डौ मैत्रात्पूर्वं चतुर्गुणम्।।

पणानां द्वे शते सार्धे प्रथमः साहसः स्मृतः।
मध्यमः पञ्च विज्ञेयः सहस्रं त्वेव चोत्तमः।। [17]

lobhātsahasraṃ daṇḍyastu mohātpūrvaṃtu sāhasam।
bhayādvau madhyamau daṇḍau maitrātpūrvaṃ caturguṇam।।

paṇānāṃ dve śate sārdhe prathamaḥ sāhasaḥ smṛtaḥ।
madhyamaḥ pañca vijñeyaḥ sahasraṃ tveva cottamaḥ।। [17]

The valid deposition of witnesses: Bṛhaspati says that:

Where the contents of the plaint have been fully corroborated by the witnesses, it is valid testimony; in every other case the plaintiff will not succeed with his claim. [18]

यस्याशेषां प्रतिज्ञार्थः साक्षिभिः प्रतिपादितम्।
स जयी स्यादन्यथा तु साध्यार्थं न समाप्नुयात्।।[18]

yasyāśeṣāṃ pratijñārthaḥ sākṣibhiḥ pratipāditam।
sa jayī syādanyathā tu sādhyārthaṃ na samāpnuyāt।।[18]

Nārada observes that when a person who has been accused in connection with several objects denies all of them, and one part is proved, it is treated that the other parts too, stand proved. Kātyāyana as mentioned in *Vyavahāra Cintāmaṇi* says that:

In case of adultery, violence, or theft, the plaint is considered completely proved as soon as the deposition of the witnesses covers part of its content.[19]

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अनेकार्थाभियुक्तेन सर्वार्थस्यापलापिना।
विभावितैकदेशेन देयं तदपि युज्यते।।

साद्यार्थांशेअपि गदिते साक्षिभिः सकलं भवेत्।
स्त्रीसङ्गे साहसे चौर्ये यत्साध्यं परिकीर्तितम्।। [19]

anekārthābhiyuktena sarvārthasyāpalāpinā।
vibhāvitaikadeśena deyaṃ tadapi yujyate।।

sādyārthāṃśeapi gadite sākṣibhiḥ sakalaṃ bhavet।[19]
strīsaṅge sāhase caurye yatsādhyaṃ parikīrtatam।।[19]

Conflict among witnesses: According to Bṛhaspati and also *Kātyāyanasmṛti* as mentioned in *Vyavahāracintāmaṇi*:

A conflict among the witnesses, the testimony of the majority should be accepted, when the number is equal on both sides, the testimony of the more virtuous ones should be accepted; when the virtuous ones are equally divided, the testimony of those shall be accepted who are eminent for the performance of religious acts; when these latter are equally divided, then the testimony of those with superior memory shall be accepted.[20]

साक्षिद्वैधे प्रभूताः स्युर्ग्राह्याः साम्ये गुणान्विताः।
गुणिद्वैधे क्रियायुक्तास्तत्साम्ये शुचिमत्तराः।। [20]

sākṣidvaidhe prabhūtāḥ syurgrāhyāḥ sāmye guṇānvitāḥ।
guṇidvaidhe kriyāyuktāstatsāmye śucimattarāḥ।।[20]

Nārada states that: *Once a suit has been decided, evidence becomes useless, unless the document or the witnesses have been referred to before.*[21]

निर्णिक्तव्यवहाराणां प्रमाणमफलं भवेत्।
लिखितं साक्षिणो वापि पूर्वभावेदितं न चेत्।। [21]

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nirṇiktavyavahārāṇāṃ pramāṇamaphalaṃ bhavet।
likhitaṃ sākṣiṇo vāpi pūrvabhāveditaṃ na cet।।[21]

According to *Bṛhaspatismṛti:*

If the witnesses disagree with one another regarding place, age, matter, quantity, shape and kind, such testimony is worthless.[22]

देशकालवयोद्रव्यप्रमाणकृतिजातिषु।
यत्र विप्रतिपत्तिः स्यात्साक्ष्यं तदपि नान्यथा।।[22]

deśakālavayodravyapramāṇakṛtijātiṣu।
yatra vipratipattiḥ syātsākṣyaṃ tadapi nānyathā।।[22]

Grounds of defeat: Kātyāyana says as per *Vyavahāra-cintāmaṇi*:

Offer of bribe, effacing the means of recognition, holding out temptation to the witnesses or judges, or suppressing the expression of one's thoughts are the grounds of defeat of a claim, put forward by a party, for establishing the failure of the party in his plea.[23]

दानं प्रज्ञापनाभेदः संप्रलोभक्रिया च या।
चित्तापनाभेदः चैव हेतवो रि विभावकाः।। [23]

dānaṃ prajñāpanābhedaḥ saṃpralobhakriyā ca yā।
cittāpanābhedaḥ caiva hetavo ri vibhāvakāḥ।।[23]

The above rules bring forth the importance attached to the purity in the administration of justice.

Circumstantial evidence: Circumstantial evidence is that which trends to establish the fact in issue by providing another fact which though does not itself conclusively establish that fact, affords an inference as to its existence. With regard to circumstantial evidence Bṛhaspati says that:

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For act that has occurred long ago and for which there are no witnesses, one should either question indirect witnesses or one should administer oaths, or one should use circumstantial evidence.[24]

असाक्षिके चिरकृते पृच्छेदुत्तरसाक्षिणः।
शपथैर्वाऽनुयुञ्जीत उपधां वा प्रयोजयेत्।। [24]

asākṣike cirakṛte pṛcchedduttarasākṣiṇaḥ।
śapathairvā>nuyuñjīta upadhāṃ vā prayojayet।। [24]

Smṛticandrika narrates the factors leading to circumstantial evidence are as under:

There are six circumstances the existence of which, if proved, the guilt may be held to have been proved without direct witnesses. The circumstances are i) the charge of the offence of incendiary by proof of the fact that he was caught with a firebrand near the scene of occurrence. ii) The charge of murder by proof of the fact that he was found near the murdered person with the weapon. iii) The charge of adultery by the fact that the accused was caught or seen when he was playing with the hair of another man's wife. iv) The charge of destroying embankment by the proof of the fact that the accused was found with a hatchet near the scene of occurrence. v) The charge of cutting trees by proof of the fact that the accused was found with an axe near the scene of occurrence.[25]

असाक्षिप्रत्ययास्त्वन्ये षड्विवादाः प्रकीर्तिताः।
लक्षणान्येव साक्षित्वमेषामाहुर्मनीषिणः।।

उल्काहस्तोऽग्निदो ज्ञेयः शस्त्रपाणिश्च घातुकः।
केशाकेशीगृहीतश्च युगपत्पारदारिकः।

कुद्दालपाणिर्विज्ञेयस्सेतुमेत्ता समीपगः।
तथा कुठारपाणिस्तु वनच्छेत्ता प्रकीर्तितः।

लोप्तहस्तश्चेरः।।[25]

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asākṣipratyayāstvanye ṣaḍvivādāḥ prakīrtitāḥ।

lakṣaṇānyeva sākṣitvameṣāmāhurmanīṣiṇaḥ।।

ulkāhastoagnido jñeyaḥ śastrapāṇiśca dhātukaḥ।

keśākeśīgṛhītaśca yugapatpāradārikaḥ।

kuddālapāṇirvijñeyassetumettā samīpagaḥ।

tathā kuṭhārapāṇistu vanacchettā prakīrtitaḥ।

loptahastaśceraḥ।।[25]

In drawing presumptions Kātyāyana as mentioned in *Vyavahāra Cintāmaṇi* observes that:

If the defendant does not retort when the plaintiff relates a fact, or if he remains silent at the time when he should produce his reply, he is considered to agree with that fact. [26]

श्राव्यमाणोऽर्थिना यत्र यो ह्यर्थो न विघातितः।

दानकालेअथवा तूष्णीं स्थितः सोअर्थोनुमोदितः।।[26]

śrāvyamāṇo>rthinā yatra yo hyartho na vighātitaḥ।

dānakāleathavā tūṣṇīṃ sthitaḥ soarthonumoditaḥ।।[26]

It is stated in *Smṛticandrika* that:

According to Bṛhaspatismṛti the inference or presumption, as a means of deciding a law suit, is of three kinds; but it is inferior to witnesses. According to Vyāsa anumana is the same as hetu and tarka. Long continued possession and the frequent urging by the creditor both lead to the inference of title and the taking of a loan respectively and are therefore to be comprehended under yukti according to the definition of Katyaana. Yet by popular usage yukti is restricted to presumptions arising from certain circumstances. Yukti (युक्तिः) therefore means circumstantial evidence from which an inference may be drawn about a fact in issue in a judicial proceeding.[27]

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Sec. 114 of the Indian Evidence Act which lays down how a court is to draw presumption of fact from the common course of natural events in relation to the facts of the case before it, illustration (a) "the court may presume that a man who is in possession of stolen goods soon after the theft is either the thief or has received the goods knowing them to be stolen, unless he can account for his possession. Judges often repeat from the Bench the words 'witnesses may lie, but circumstances cannot'. But this so-called maxim was treated as not so much reliable by many jurists. Circumstantial evidence leads to conclusions that are in several instances false. The ancient Hindu lawyers were quite aware of the dangers of drawing inferences from circumstantial evidence.

The 9th Act of the '*Mṛchchakaṭikam*' of Sūdraka is a standing literary condemnation of conclusions about guilt drawn from circumstantial evidence and of how judicial procedure is vitiated. In a Court judgement a note of caution is given while drawing inferences from circumstantial evidence:

"In dealing with circumstantial evidence there is always the danger that suspicion may take the place of legal proof. It is to remember that in the cases of circumstantial evidence the circumstances from which the conclusion of guilt is to be drawn should in first instance, be fully established and all the facts so established first should be consistent with the hypothesis of the guilt of the accused."[28]

The depositions of witnesses constitute an important part of law of evidence. Kinds of witnesses and the related procedures are examined in the next sub head 'Witnesses".

End Notes

1 *Bṛhaspatismṛti*. Ed. Aiyangar, K.V. Rangaswami. (Baroda, Gaikwad's Oriental Series, 1941) IV, 3

2 *Yājñavalkyasmṛti (Mitākṣarānusari)* Ed. Mahamaho-padhyaya Dr. Pullela Sriramachandrudu. (Nandanam, Hyderabad. 2003) II-22

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3 *Dharmakośa*. Editor: Laxmanasastry. Wai (Satara Prajna Pathasala Mandala, 1953) pp.232-233)

4 *The Kauṭilīya Arthaśāstra* Part-1. Editor: R. P. Kangle. (Delhi-7. Motilal Banarsidass, 1986) 3.11.25-27

5 *Vyavahāra Cintāmaṇi of Vacaspati Misra*. Ed, K. Jithendra Babu. (Hyderabad, Sree Bhagavan Publications. 2006) p.147

6 *Mahābhārat*. Editor: Pandita Ramnarayan data. (Gorakhpure. Gita Press, 1965) SabhāParva, 68-84, 85

7 *Manusmṛtisāram*. Editor: Keshoram Aggarwal. (Gorakhpure. Gita Press, 1999) II- 74

Panduranga Vamana Kane. *History ofDharmaśāstrā,* Volume III. (Pune. Bhandarkar Oriental Research Institute, 1993) Vol. III p.330

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9 *Manusmṛtisāram*. Editor: Keshoram Aggarwal. (Gorakhpure. Gita Press, 1999) VIII- 118

10 *Vyavahāra Cintāmaṇi of Vacaspati Misra*. Ed, K. Jithendra Babu. (Hyderabad, Sree Bhagavan Publications. 2006) p.144

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12 *The Kauṭilīya Arthaśāstra* Part-1. Editor: R. P. Kangle. (Delhi-7. Motilal Banarsidass, 1986) 3.11.44-49

13 *Yājñavalkyasmṛti (Mitākṣarānusari)* Ed. Mahamaho Padhyaya Dr. Pullela Sriramachandrudu. (Nandanam, Hyderabad. 2003) II-78

14 *Bṛhaspatismṛti*. Ed. Aiyangar, K.V. Rangaswami. (Baroda, Gaikwad's Oriental Series, 1941)V- 32, 33

15 *Vyavahāra Cintāmaṇi of Vacaspati Misra*. Ed, K. Jithendra Babu. (Hyderabad, Sree Bhagavan Publications. 2006) p.123)

16 Ibid., p.146, 82

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17 *Manusmṛtisāram.* Editor: Keshoram Aggarwal. (Gorakhpure. Gita Press, 1999)VIII-120, 138

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19 *Vyavahāra Cintāmaṇi of Vacaspati Misra.* Ed, K. Jithendra Babu. (Hyderabad, Sree Bhagavan Publications. 2006) p.237, 186)

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21 Ibid., p.189)

22 *Bṛhaspatismṛti.* Ed. Aiyangar, K.V. Rangaswami. (Baroda, Gaikwad's Oriental Series, 1941) V-49

23 *Vyavahāra Cintāmaṇi of Vacaspati Misra.* Ed, K. Jithendra Babu. (Hyderabad, Sree Bhagavan Publications. 2006) p.238

24 *Bṛhaspatismṛti.* Ed. Aiyangar, K.V. Rangaswami. (Baroda, Gaikwad's Oriental Series, 1941) VII- 68

25 Devana Bhatta. *Smṛti Chandrika,* Vol.III. (Bombay. Govt Oriental Library Series, 1914&1916) Pp. 220&221

26 *Vyavahāra Cintāmaṇi of Vacaspati Misra.* Ed, K. Jithendra Babu. (Hyderabad, Sree Bhagavan Publications. 2006) p.235)

27 Devana Bhatta. *Smṛti Chandrika,* Vol.III. (Bombay. Govt Oriental Library Series, 1914&1916) II. P.95)

28 (Hanumanth Vs. State of MP. (AIR (1952) SC 343

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vi) Witnesses

Witnesses: A person who has directly seen or heard is called as witness. In disputed cases the truth shall be established by means of witnesses. In doubtful cases, when two parties are quarrelling with one another, the truth has to be gathered from the deposition of witnesses, whose knowledge is based upon what they have seen, heard or learnt. The word sakshin(साक्षिन्) means 'one that has directly seen' as defined by Panini in *aṣṭādhyāyī*.[1]

साक्षाद् द्रष्टरि संज्ञायाम्। [1]

sākṣād draṣṭari saṃjñāyām। [1]

According to Manusmṛti:

In a matter which is an object of eyes, eye-witnesses should be given importance. If it is an object of hearing the oral statement can be relied upon. A witness speaking truth never suffers in regard of Dharma and Artha.[2]

समक्षदर्शनात्साक्ष्यं श्रवणाच्चैव सिध्यति।
तत्र सत्यं बृवन्साक्षी धर्मार्थाभ्यां न हीयते।। [2]

samakṣadarśanātsākṣyaṃ śravaṇāccaiva sidhyati।
tatra satyaṃ bṛvansākṣī dharmārthābhyāṃ na hīyate।।[2]

In *Nāradasmṛti* as mentioned in *Dharmakośa* also it is stated about the witnesses that:

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He should be considered as a witness who has been a witness to a deed with his own ears or eyes; with his ears if he has heard another man speaking, and with his eyes if he has seen something himself.[3]

समक्षदर्शनात्साक्षी विज्ञेयः श्रोत्रचक्षुषोः।
श्रोत्रस्य यत्परो ब्रूते चक्षुषोर्दर्शनं स्वयम्।। [3]

samakṣadarśanātsākṣī vijñeyaḥ śrotracakṣuṣoḥ।
śrotrasya yatparo brūte cakṣuṣordarśanaṃ svayam।। [3]

About the kinds of witnesses Nārada *observes as mentioned in Dharmakośa:*

The witnesses are two kinds: 'appointed' and 'not appointed'. Appointed witness is one whose name has been entered in the document, whereas the un-appointed witness is one who is not so mentioned. Out of eleven types of witnesses five are appointed and the other six are un- appointed witnesses.[4]

एकादशविधः साक्षी शास्त्रे दृष्टो मनीषिभिः।
कृतः पञ्चविधस्तेषां षड्विधोऽकृत उच्यते।। [4]

ekādaśavidhaḥ sākṣī śāstre dṛṣṭo manīṣibhiḥ।
kṛtaḥ pañcavidhasteṣāṃ ṣaḍvidho'kṛta ucyate।। [4]

With regard to th appointed witnesses It is stated that:

i) Subscribing witness is one who has attested a document, and referred witness is one whose name is referred to in a document as having been present at the time of the transaction. ii) Secret witness is one who was asked by one of the parties to remain concealed at the time of a transaction and to hear as to what the parties say. iii) Indirect witness is one who has heard from another appointed witness before the latter's death or going abroad. iv)Reminded witness is one who, though not referred to in the document, or has not attested, was present at the time of the transaction, having been invited to be present and has been repeatedly reminded about the facts relating to the

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transaction. v) Casual witness is one who was present at the time of the transaction, having come there by chance and witnessed the same. [5]

लिखितस्मारितश्चैव यदृच्छाभिज्ञ एव च।
गूढश्चोत्तरसाक्षी च साक्षी पञ्चविधः कृतः।। [5]

likhitasmāritaścaiva yadṛcchābhijña eva ca।
gūḍhaścottarasākṣī ca sākṣī pañcavidhaḥ kṛtaḥ।। [5]

With regard to the unappointed witnesses he further says:

i) the villager, ii) a judge, iii) a king, iv) persons acquainted with the affairs of the parties concerned, v) one deputed by a claimant, and vi) a member of the family.[6]

अन्ये पुनरनिर्दिष्टाः साक्षिणः समुदाहुताः।
ग्रामाश्च प्राड्विवाकश्च राजा च व्यवहारिणाम्।।

कार्येष्वन्यतरो यश्च अर्थिना प्रहितश्च यः।
कुल्याः कुलविवादेषु भवेयुस्तेऽपि साक्षिणः।।[6]

anye punaranirdiṣṭāḥ sākṣiṇaḥ samudāhrutāḥ।
grāmāśca prāḍvivākaśca rājā ca vyavahāriṇām।।

kāryeṣvanyataro yaśca arthinā prahitaśca yaḥ।
kulyāḥ kulavivādeṣu bhaveyuste'pi sākṣiṇaḥ।।[6]

In *Yājñavalkyasmrti* it is stated that:

Even one virtuous man may be produced as a witness if he is approved of by both the parties. And in cases of adultery, theft, assault, defamation and crimes, all men can be admitted as witnesses.[7]

उभयानुमतः साक्षी भवत्येकोऽपि धर्मवित्।
सर्वःसाक्षी संग्रहणे चौर्यपारुष्यसाहसे।। [7]

ubhayānumataḥ sākṣī bhavatyeko'pi dharmavit।
sarvaḥsākṣī saṃgrahaṇe cauryapāruṣyasāhase।। [7]

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According to *Manusmṛti:*

If there is a case without a witness and the two parties contradict each other and the king is not in a position to know the reality he may ask the parties to take oaths and swear.[8]

असाक्षिकेषु त्वर्थेषु मिथो विवादमानयोः।
अविन्दंस्तत्वतःसत्यं शपथेनापि लभ्येत्।।[8]

asākṣikeṣu tvartheṣu mitho vivādamānayoḥ।
avindaṃstatvataḥsatyaṃ śapathenāpi labhyet।।[8]

Production of witnesses: The parties themselves shall be responsible for producing those witnesses. *The Kautiliya Arthaśāstra* says:

The (plaintiff or defendant) shall produce witnesses who are not at a great distance in place or time. He may secure those who are at a distance or are unwilling to come, with a summons from king.[9]

देशकालविदूरस्थान् साक्षिणः प्रतिपादयेत्।
दूरस्थानप्रसारान् वा स्वामिवाक्येन साधयेत्।।[9]

deśakālavidūrasthān sākṣiṇaḥ pratipādayet।
dūrasthānaprasārān vā svāmivākyena sādhayet।।[9]

Bṛhaspatismṛti says that:

The king or chief judge, in person, having heard the arguments of plaintiff and defendant, may act as witness if both should quarrel with one another.[10]

अर्थिप्रत्यर्थिनोर्वाक्यं यच्धृतं भूभृता स्वयम्।
स एव तत्र साक्षी स्याद्विसंवादे द्वयोरपि।। [10]

arthipratyarthinorvākyaṃ yacdhṛtaṃ bhūbhṛtā svayam।
sa eva tatra sākṣī syādvisaṃvāde dvayorapi।। [10]

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It is stated in *Manusmṛti* that:

The witnesses can be from any caste but they should be of indubitable character, religious and un-greedy. The persons not having these qualities should be disallowed as a witness.[11]

आप्ताः सर्वेषु वर्णेषु कार्याः कार्येषु साक्षिणः।
सर्वधर्मविदोअलुब्धाः विपरीतांस्तु वर्जयेत्।।[11]

āptāḥ sarveṣu varṇeṣu kāryāḥ kāryeṣu sākṣiṇaḥ।
sarvadharmavidoalubdhāḥ viparītāṃstu varjayet।।[11]

In *Yājñavalkyasmṛti* it is stated that witnesses shall be:

Persons devoted to austerities, charitable persons, persons of noble families, truthful persons, persons having great regard for virtue, straightforward persons, persons having children, wealthy persons, persons engaged in the performance of acts prescribed in the scriptures-either according to jati or varna, or all for all.[12]

तपस्विनो दानशीलाः कुलीनाः सत्यवादिनः।
धर्मप्रधाना ऋजवः पुत्रवन्तो धनान्विताः।।

त्र्यवराः साक्षिणो ज्ञेयाः श्रौतस्मार्तक्रियापराः।
यथाजाति यथावर्णं सर्वे सर्वेषु वा स्मृताः।।[12]

tapasvino dānaśīlāḥ kulīnāḥ satyavādinaḥ।
dharmapradhānā ṛjavaḥ putravanto dhanānvitāḥ।।

tryavarāḥ sākṣiṇo jñeyāḥ śrautasmārtakriyāparāḥ।
yathājāti yathāvarṇaṃ sarve sarveṣu vā smṛtāḥ।।[12]

Nārada as mentioned in *Vyavahāra Cintāmaṇi*, says that:

The witnesses shall be of honorable family, straightforward, and unexceptionable as to their descent, their actions, and their fortune. The witnesses shall not be less than three in number, unimpeachable, honest, and pure-minded.[13]

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कुलीना ऋजवः शुद्धा जन्मतः कर्मतोऽर्थतः।
त्र्यवराः साक्षिणो ज्ञेयाः शुचयः शुद्धबुद्धयः।। [13]

kulīnā ṛjavaḥ śuddhā janmataḥ karmatoarthataḥ।
tryavarāḥ sākṣiṇo jñeyāḥ śucayaḥ śaddhabuddhayaḥ।। [13]

Manusmṛti says that:

If a dispute takes place inside the house or in a forest or in case where physical fighting has taken place any eye witness may be produced. There is no binding of any kind. In the case of violence, theft, adultery, defamation and assault, the competence of witnesses shall not be considered too strictly. In case of ladies only ladies can be witnesses, for brāhmaṇas only brāhmaṇas sudras for sudras only, and only candalas should be witness in the suit filed by a candela (चण्डालः). [14]

अनुभवी तु यः कश्चित्कुर्यात्साक्ष्यं विवादिनाम्।
अन्तर्वेश्मन्यरण्ये वा शरीरस्यापि चात्यते।।

साहसेषु च सर्वेषु स्तेयसंग्रहणेषु च।
वाग्दण्डयोश्च पारुष्ये न परीक्षेत साक्षिणः।।

स्त्रीणां साक्ष्यं स्त्रियः कुर्युद्विजानां सदृशा द्विजाः।
शूद्रश्च सन्तः शूद्राणामन्त्यानामन्त्ययोनयः।।[14]

anubhavī tu yaḥ kaścitkuryātsākṣyaṃ vivādinām।
antarveśmanyaraṇye vā śarīrasyāpi cāltyate।।

sāhaseṣu ca sarveṣu steyasaṃgrahaṇeṣu ca।
vāgdaṇḍayośca pāruṣye na parīkṣeta sākṣiṇaḥ।।

strīṇāṃ sākṣyaṃ striyaḥ kuryudvijānāṃ sadṛśā dvijāḥ।
śūdraśca santaḥ śūdrāṇāmantyānāmantyayonayaḥ।।[14]

Acording to *The Kautiliya Arthaśāstra* the following shall be called as witnesses only in cases concerning their own groups:

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The King, a Brāhmin Learned in the Vedas, a village servant, a leper and a wounded man, an outcast, a candala, a person following a despised profession, a blind, deaf dumb or self invited person, a woman and a King's officer (shall not be cited as witnesses) except in the case of their own groups. 30 In case of (verbal and physical) injury, theft and adultery, however, (all may be cited as witnesses) except an enemy, a wife's brother and an associate. 31 In the case of secret transactions, one woman or man, who has heard or witnessed it, may be cited as a witness, excepting the King or an ascetic. 32 Masters may bear tesstimony for servants, priests and preceptors for disciples, and parents for sons, without being forced, or the latter (may do so) for them. 33 And in case of their suing each other, the betters, if defeated, shall pay one-tenth (as fine), the inferiors, one-fifth.[15]

राजाश्रोत्रियग्रामभृतककुष्ठिव्रणिनः पतितचण्डालकुत्सितकर्माणोअन्ध बधिर मूकाहंवादिनः स्त्रीराजपुरुषाश्च, अन्यत्र स्ववर्गेभ्यः।29पारुष्यस्तेयसंग्रहणेषु तु वैरिस्यालसहायवर्जाः।30 रहस्यव्यवहारेष्वेका स्त्री पुरुष उपश्रोता उपद्रष्टा वा साक्षी स्याद् राजतापसवर्जम्।31 स्वामिनो भृत्यानामृत्विगाचार्याः शिष्याणां मातापितरौ पुत्राणां चानिग्रहेण साक्ष्यं कुर्युः, तेषामितरे वा। 32 परस्पराभियागे चैषाम् उत्तमाः परोक्ता दशबन्धं दद्युः, अवराः पञ्चबन्धम्।[15] 33

rājāśrotriyagrāmabhṛtakakuṣṭhivraṇinaḥ
patitacaṇḍālakutsitakarmāṇoandha badhira

mūkāhaṃvādinaḥ strīrājapuruṣāśca, anyatra
svavargebhyaḥ।pāruṣyasteyasaṃgrahaṇeṣu tu
vairisyālasahāyavarjāḥ। rahasyavyavahāreṣvekā
strī puruṣa upaśrotā upadraṣṭā vā sākṣī syād
rājatāpasavarjam। svāmino bhṛtyānāmṛtvigācāryāḥ
śiṣyāṇāṃ mātāpitarau putrāṇāṃ cānigraheṇa sākṣyaṃ
kuryuḥ, teṣāmitare vā। parasparābhiyāge caiṣām uttamāḥ
paroktā daśabandhaṃ dadyuḥ, avarāḥ pañcabandham।
iti sākṣyadhikāraḥ।[15]

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Section 118 of the Indian Evidence Act prescribes the qualification of persons who may give evidence before the court. According to that section, persons of tender age, extreme old age, or having disease (whether of body or mind or any cause of similar nature) or who are lunatics, are disqualified to be witnesses. These disqualifications were also laid down for determining the competence of a witness in the ancient Indian law. There were a few other disqualifications. Bṛhaspati prohibited the evidence of some of the close relatives and friends.Kātyāyana also lays down a similar rule. But he provided an exception, namely, that close relatives or friends are competent witnesses in disputes between members of a family. Under the evidence Act, there is no disqualification other than those mentioned in sec 118.

With regard to the summoning of witnesses *Kātyāyanasmṛti* as mentioned in the *Legal and Constitutional History of India* says:

The parties shall themselves produce witnesses who are not far removed either by time or place; witnesses who are very far removed either by time or place, or who refuse to stir out, shall be made to be present themselves by the order of the judge.[16]

देशकालविदूरस्थान् साक्षिणः प्रतिपादयेत्।
दूरस्थान् अप्रसारान् वा स्वामिवाक्येन साधयेत्।।[16]

deśakālavidūrasthān sākṣiṇaḥ pratipādayet।
dūrasthān aprasārān vā svāmivākyena sādhayet।।[16]

CPC Order XVI-R-1, 1-A deal with the list of witnesses and summons to them. It is said that any party to the suit can appear to tender evidence without summons with the approval of the court.

About the imposition of penalty for failure to give evidence *Manusmṛti* says that:

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A man who, without being unwell, fails to appear before the court to give evidence, within three fortnights after the service of summons, shall be responsible for the whole liability involved in the case and will also be liable to pay one tenth part of the whole liability as fine to the king.[17]

त्रिपक्षादब्रुवन् साक्ष्यमृणादिषु नरोऽगदः।
तदृणं प्राप्नुयात् सर्वं दशबन्धं च सर्वतः।।[17]

tripakṣādabruvan sākṣyamṛṇādiṣu naro'gadaḥ।
tadṛṇaṃ prāpnuyāt sarvaṃ daśabandhaṃ ca sarvataḥ।।[17]

In this regard *Yājñavalkyasmṛti* also says that:

A witness who knows the facts of the case, does not turn up to give evidence, is equal to giving false evidence and therefore he is liable for punishment.[18]

न ददाति हि यः साक्ष्यं जानन्नपि नराधमः।
स कूठसाक्षिणां पापैस्तुल्यो दण्डेन चैव हि।। [18]

na dadāti hi yaḥ sākṣyaṃ jānannapi narādhamaḥ।
sa kūṭhasākṣiṇāṃ pāpaistulyo daṇḍena caiva hi।। [18]

The above rule shows that witnesses were under legal compulsion to give evidence before the court. Failure to appear before the court entailed heavy penalty. This rule was obviously meant to compel the attendance of witnesses. According to Yājñavalkyasmṛti II- 77 failure to give evidence amounted to the giving of false evidence. With regard to imposing severe penalty on witnesses, Civil Proceedure Code is silent.

Subsistence allowance to witnesses: With regard to the payment of subsistace allowance Kātyāyana as stated in the *Legal and Constitutional History of India* says that:

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Fees for witnesses shall be one-eigth of a pana. Provision in proportion to the amount sued for may also be made for the expenses incurred by witnesses on their journey. The defeated party shall pay these two kinds of cost.[19]

पुरुषभृतिरष्टांशः। पथिभक्तमर्थविशेषतः। तदुभयं नियम्यो दद्यात्।[19]

puruṣabhṛtiraṣṭāṃśaḥ। pathibhaktamarthaviśeṣataḥ। tadubhayaṃ niyamyo dadyāt।[19]

CPC, Order XVI, R-2: says that the expenses are to be deposited in the court for getting the summons issued to the witnesses. R-2 (4) also provides for payment of expenses directly to witnesses for their attendance.

With regard to the depositon of witnesses *Kātyāyanasmṛti* as mentioned in the *Vyavahāracintāmaṇi:*

Witnesses should depose inside the court and not elsewhere; this rule applies to all cases of testimony except with regard to immovable. If anything has been fully seen with an unobstructed mind, it is said to be a perceptible fact and he should depose that as a testimony. The witnesses, however, should give their evidence in the presence of the plaintiff or the defendant as the case may be and never behind their back. The general rule was that witnesses were to be examined only in the court hall. An exception is provided to this general rule in respect of disputes relating to immovable property or livestock. In such cases witnesses could be examined near the property or livestock/ near the property in dispute. Where it is not possible to bring witnesses to the court, for the reason that they stay in a different country, their evidence recorded in writing sent by men learned in the three Veda may be taken as evidence in the case.[20]

सभान्तस्थैस्तु वक्तव्यं साक्ष्यं नान्यत्र साक्षिभिः।
सर्वसाक्षेष्वयं धर्मोअन्यत्र स्यात् स्थावरेषु च।।

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अनुद्विग्नेनचित्तेन दृष्टं सम्यग्दा तु यत्।
प्रत्यक्षं तत् स्मृतं कार्यं साक्ष्यं साक्षी तु तद्वदेत्।।

अर्थिप्रत्यर्थिसांनिध्ये साध्यार्थस्य च सन्निधौ।
प्रत्यक्षं देशयेत् साक्ष्यं परोक्षं न कथञ्चन।।

अर्थस्योपरि वक्तव्यं तयोरपि विना क्कचित्।
चतुष्पदेष्वयं धर्मो द्विपदस्थावरेषु च।।

अशक्य आगमो यत्र विदेशप्रतिवासिनाम्।
त्रैविद्यप्रहितं तत्र लेख्यसाक्ष्यं प्रवादयेत्।।[20]

sabhāntasthaistu vaktavyaṃ sākṣyaṃ nānyatra sākṣibhiḥ।
sarvasākṣeṣvayaṃ dharmoanyatra syāt sthāvareṣu ca।।

anudvignenacittena dṛṣṭaṃ samyagdā tu yat।
pratyakṣaṃ tat smṛtaṃ kāryaṃ sākṣyaṃ sākṣī tu tadvadet।।

arthipratyarthisāṃnidhye sādhyārthasya ca sannidhau।
pratyakṣaṃ deśayet sākṣyaṃ parokṣaṃ na kathañcana।।

arthasyopari vaktavyaṃ tayorapi vinā kkacit।
catuṣpadeṣvayaṃ dharmo dvipadasthāvareṣu ca।।

aśakya āgamo yatra videśaprativāsinām।
traividyaprahitaṃ tatra lekhyasākṣyaṃ pravādayet।।[20]

Order XVI, R, 7of CPC authorizes the court to issue a commission for the examination of witness who could not be brought to the court, for example prisoners. Order XVIII, R, 19 of CPC also empowers the court to get statements recorded on commission so that the wintness need not attend the court.

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Now it is allowed to cross examine the witnesses through Video conference; or by appointment of a commissioner.

It is stated in *Manusmṛti* that:

In the cases where witnesses gave false statements, those cases should be reopened and reconsidered if it is found out that the cases were decided on false grounds. Such decisions are as good as not taken. He also observes that the statement of a witness motivated by greed, infatuation, fear, friendship, lust, anger, ignorance and innocence is taken to be false.[21]

यस्मिन्यस्मिन्विवादे तु कौटसाक्ष्यं कृतं भवेत्।
तत्तत्कार्यं निवर्तेत कृतं चाप्यकृतं भवेत्।।

लोभान्मोहाद्भयान्मैत्रात्कामात्क्रोधात्तथैव च।
अज्ञानाद्बालभावाच्च साक्ष्यं वितथमुच्यते।।[21]

yasminyasminvivāde tu kauṭasākṣyaṃ kṛtaṃ bhavet।
tattkāryaṃ nivarteta kṛtaṃ cāpyakṛtaṃ bhavet।।

lobhānmohādbhayānmaitrātkāmātkrodhāttathaiva ca।
ajñānādbālabhāvācca sākṣyaṃ vitathamucyate।।[21]

With regard to the absence of the witnesses *Bṛhaspatismṛti* says that:

If a witness on being summoned does not make his appearance, without being ill, he should be made to pay the debt and a fine, after the lapse of three fortnights.[22]

आहूतो यस्तु नागच्छेत् साक्षी रोगविवर्जितः।
ऋणं दण्डं च दाप्यः स्यात् त्रिपक्षात् परतस्तु सः।।[22]

āhūto yastu nāgacchet sākṣī rogavivarjitaḥ।
ṛṇaṃ daṇḍaṃ ca dāpyaḥ syāt tripakṣāt paratastu saḥ।।[22]

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According to Nārada as referred to in *Vyavahāra Cintāmaṇi* :

A witness who deposes suo motu is one who comes and speaks only of his own accord without having been appointed. A witness is mrtantara, if the party has died between the facts and the trial; his testimony is invalid except if he has been mentioned by the person at the time of his death.[23]

स्वयमुक्तरनिर्दिष्टः स्यमेवैत्य यो वदेत्।
मृतान्तरोऽर्थिनि प्रेते मुमूर्षुश्राविताद्दते।[23]

svayamuktaranirdiṣṭaḥ syamevaitya yo vadet।
mṛtāntaro'rthini prete mumūrṣuśrāvitādṛte।[23]

Along with the depositions of witnesses the evidentiary value of the documents and possession is also important. How documents provide strong evidence and how the 'possession' in some contexts confers ownership without proper title are discussed in the next sub head, "Documents and Possession".

End Notes

1 Panini. *Aṣṭādhyāyī* Ed. Prof. Gopala Dutt Pandeya. (Varanasi Choukhamba Surabharati Prakasan 2000) V, 2, 91

2 *Manusmṛtisāram.* Editor: Keshoram Aggarwal. (Gorakhpure. Gita Press, 1999) VIII- 74

3 *Dharmakośa.* Editor: Laxmanasastry. Wai (Satara Prajna Pathasala Mandala, 1953) p.296

4 Ibid., p.297

5 Ibid., p.297-298

6 Ibid., p. 297-298:

7 *Yājñavalkyasmṛti (Mitākṣarānusari)* Ed. Mahamaho Padhyaya Dr. Pullela Sriramachandrudu. (Nandanam, Hyderabad. 2003) II-72

8 *Manusmṛtisāram.* Editor: Keshoram Aggarwal. (Gorakhpure. Gita Press, 1999) VIII-109

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9 *The Kauṭiliya Arthaśāstra* Part-1. Editor: R. P. Kangle. (Delhi. Motilal Banarsidass, 1986) 3.11.50

10 *Bṛhaspatismṛti.* Ed. Aiyangar, K.V. Rangaswami. (Baroda, Gaikwad's Oriental Series, 1941)V16

11 *Manusmṛtisāram.* Editor: Keshoram Aggarwal. (Gorakhpure. Gita Press, 1999)VIII-63

12 *Yājñavalkyasmṛti (Mitākṣarānusari)* Ed. Mahamaho padhyaya Dr.Pullela Sriramachandrudu. (Nandanam, Hyderabad. 2003) II-68, 69

13 *Vyavahāra Cintāmaṇi of Vacaspati Misra.* Ed, K. Jithendra Babu. (Hyderabad, Sree Bhagavan Publications. 2006) p. 121)

14 *Manusmṛtisāram.* Editor: Keshoram Aggarwal. (Gorakhpure. Gita Press, 1999)VIII- 69, 72, 68

15 *The Kauṭilīya Arthaśāstra* Part-1. Editor: R. P. Kangle. (Delhi. Motilal Banarsidass, 1986) 3.11-29-33

16 Justice M. Rama Jois. *Legal and Constitutional History of India.* (New Delhi. Universal Law Publishing Co, 2009) p.541

17 *Manusmṛtisāram.* Editor: Keshoram Aggarwal. (Gorakhpure. Gita Press, 1999) VIII- 107:

18 *Yājñavalkyasmṛti (Mitākṣarānusari)* Ed. Mahamahopadhyaya Dr. Pullela Sriramachandrudu. (Nandanam, Hyderabad. 2003) II- 77

19 Justice M. Rama Jois. *Legal and Constitutional History of India.* (New Delhi. Universal Law Publishing Co, 2009) p.542

20 *Vyavahāra Cintāmaṇi of Vacaspati Misra.* Ed, K. Jithendra Babu. (Hyderabad, Sree Bhagavan Publications. 2006) p.163, 164 147)

21 *Manusmṛtisāram.* Editor: Keshoram Aggarwal. (Gorakhpure. Gita Press, 1999)VIII-117, 118

22 *Bṛhaspatismṛti.* Ed. Aiyangar, K.V. Rangaswami. (Baroda, Gaikwad's Oriental Series, 1941) V- 45

23 *Vyavahāra Cintāmaṇi of Vacaspati Misra.* Ed, K. Jithendra Babu. (Hyderabad, Sree Bhagavan Publications. 2006) p.130)

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vii) Document and Possession as evidence

With regard to the kinds of documents *Nārada Smṛti* as mentioned in *VVyavahāra Cintāmaṇi says:*

Documents are said to be of two kinds, in one's own handwriting and in that of another person, without witnesses and with witnesses respectively. The validity of both depends on local usage.[1]

लेख्यं तु द्विविधं प्रोक्तं स्वहस्तान्याक्षरं तथा।
असाक्षिकं साक्षिमच्च सिद्धिर्देशस्थितेस्तयोः।।[1]

lekhyaṃ tu dvividhaṃ proktaṃ
svahastānyākṣaraṃ tathā।
asākṣikaṃ sākṣimacca siddhirdeśasthitestayoḥ।।[1]

That means, a document in one's own handwriting constitutes valid evidence even without requiring a witness in addition, but a document in another person's hand writing does require one. Various kinds of Documents are described in smṛti literature.

In *Bṛhaspatismṛti* ten kinds of documents are described asunder:

There were seven kinds of documents emanating from common people and three kinds from the King. The documents issued by the common people are, i) Partition, ii) Gift, iii) Purchase, iv) Mortagage, v) Convention or Agreement, vi) Bondage, vii) Debt. The documents

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emanating from the King are of three kinds. A document issued by the King under the Royal seal is called Royal edict. (This is similar to the present Gazette publication issued by the Government.) *Of the royal edict there are three divisions- i) Dānapatra (दानपत्रम्), Royal Grant, ii) Prasādalekhaḥ (प्रसादलेखः), mark of Royal Favour and iii) Jayapatra(जयपत्रम्), Decree.* [2]

भागदानक्रयाधीनां संविद्दासऋणादिभिः।
सप्तधा लौकिकं लेख्यं त्रिविधं राजशासनम्।।

दत्वा भूम्यादिकं राजा ताम्रपत्रे पटेऽथवा।
शासनं कारयेद्धर्मं स्थानवंशादिसंयुतम्।।

देशादिकं यस्य राजा लिखितं तु प्रयच्छति।
सेवाशौर्यादिना तुष्टः प्रसादलिखितं हि तत्।।

धर्मेण व्यवहारेण चारित्रेण नृपाज्ञया।
चतुष्प्रकारोऽभिहितः सन्दिग्धेऽर्थे विनिर्णयः।।[2]

bhāgadānakrayādhīnāṃ saṃviddāsaṛṇādibhiḥ।
saptadhā laukikaṃ lekhyaṃ trividhaṃ rājaśāsanam।।

datvā bhūmyādikaṃ rājā tāmrapatre paṭe'thavā।
śāsanaṃ kārayeddharmaṃ sthānavaṃśādisaṃyutam।।

deśādikaṃ yasya rājā likhitaṃ tu prayacchati।
sevāśauryādinā tuṣṭaḥ prasādalikhitaṃ hi tat।।

dharmeṇa vyavahāreṇa cāritreṇa nṛpājñayā।
catuṣprakāro'bhihitaḥ sandigdhe'rthe vinirṇayaḥ।।[2]

Recognizing the services, King used to issue Royal Grant to a person conferring title on land etc. which is called dānapatram. When the King, satisfied with the faithful services, valour and other good qualities of a person, bestows upon him landed or other

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property, the document conveying this gift is called Prasadalekhaḥ mark of Royal favour. The document that establishes a claim, recording the four parts of the judicial proceedings and bearing the Royal seal, is called Jayapatram, Decree.

Smṛticandrika says:

A document is certainly not over-ruled either by witnesses or by ordeal. An obligation or liability created by writing (document) can only be annulled by another document. A written document is superior to witnesses; witnesses are not superior to written document.[3]

न जातु हीयते लेख्यं साक्षिभिश्शपथेन वा।।
लिखितं लिखितेनैव साक्षिमत्साक्षिभिहरेत्।।

साक्षिभ्यो लिखितं ज्ञेयं लिखितान्न तु साक्षिणः।।[3]

na jātu hīyate lekhyaṃ sākṣibhiśśapathena vā।।
likhitaṃ likhitenaiva sākṣimatsākṣibhirharet।।

sākṣibhyo likhitaṃ jñeyaṃ likhitānna tu sākṣiṇaḥ।।[3]

Sīmapatram is the document setting forth the delimitations of disputed boundaries, as recorded by the King, after due investigation, mentioning the names of witnesses through whom the decision has been arrived at. With regard to the admissibility of only documentary evidence, *Bṛhaspatismṛti* says that:

Agreements of associations of traders or guilds should be established only by documentary evidence and not by witnesses or ordeals.[4]

पूगश्रेणिगणादीनां या स्थितिः परिकीर्तिता।
तस्यास्तु साधनं लेख्यं न दिव्यं न च साक्षिणः।।[4]

pūgaśreṇigaṇādīnāṃ yā sthitiḥ parikīrtitā।
tasyāstu sādhanaṃ lekhyaṃ na divyaṃ na ca sākṣiṇaḥ।।[4]

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All smṛtikaras were unanimous with regard to the order of preference in the matter of evidentiary value of documents, witnesses or ordeals. Documentary evidence excluded oral evidence and ordeals. Therefore neither oral nor ordeal means of proof could be permitted as against documents. Oral evidence was to be preferred to ordeals. Therefore, a party could not offer to prove his case by ordeals in preference to witnesses. As regards conventions of associations and guilds, they could be proved only by producing sthitipatra ie., document recording the conventions. It may be noted here that the contents of Sec. 91-100 of Chapter VI of Indian Evidence Act deals with the exclusion of oral evidence by documentary evidence are almost similar to the rules provided by smṛtis.

With regard to the invalidity of documents *Vyāsasmṛti* and *Kātyāyanasmṛti* as mentioned in *Vyavahāracintāmaṇi and Legal and Constitutional History of India* state that:

A document is not valid i) if it has not been seen, ii) if it has not been heard of, iii) if the creditor or iv) the debtor has died, v) if there is neither a pledge nor vi) a surety, and vii) if it was made up a long time ago. A document which has never been seen by anybody for more than thiry years, nor read out to any body, is not valid even if witnesses thereto are alive.[5]

अदृष्टाश्रावितं लेख्यं प्रमीतधनिकर्णिकम्।
अबन्धलग्नकं चैव बहुकालं न सिध्यति।।

लेख्यं त्रिंशत्समातीतमदृष्टाश्रवितं च यत्।
न तत्सिद्धिमवाप्नोति तिष्ठत्स्वपि हि साक्षिषु।। [5]

adṛṣṭāśrāvitaṃ lekhyaṃ pramītadhanikarṇikam।
abanddhalagnakaṃ caiva bahukālaṃ na sidhyati।।

lekhyaṃ triṃśatsamātītamadṛṣṭāśravitaṃ ca yat।
na tatsiddhimavāpnoti tiṣṭhatsvapi hi sākṣiṣu।। [5]

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Bṛhaspatismṛti has provided an exception by saying that:

A document executed by a mad man, an idiot an infant, one who has absconded through fear of the king, a bashful person or one tormented by fear, is not invalidated by an impossibility to produce its author.[6]

उन्मत्तजडबालानां राजभीतप्रवासिनाम्।
अप्रगल्भभयार्तानां न लेख्यं हानिमाप्नुयात्।। [6]

unmattajaḍabālānāṃ rājabhītapravāsinām।
apragalbhabhayārtānāṃ na lekhyaṃ hānimāpnuyāt।। [6]

In *Kātyāyanasmṛti* as mentioned in *smṛticandrika* and *Vyavahāracintāmaṇi* it is said that:

The document bearing the royal seal should be presumed to be genuine even when all the parties to such document are dead. When a person possesses an object on the authority of a document in the presence of a capable opponent for a period twenty years; after that the document is considered free of defects. If the debtor does not point out a patent defect when he sees a document, the document becomes unchallengeable after a period of twenty years.[7]

समुद्रे तु यथा लेख्ये मृतास्सर्वेऽपि तत्स्थिताः।
लिखितं तत्प्रमाणं तु मृतेष्वपि हि तेषु वै।।

दृष्टे पत्रे स्फुटान् दोषान्नोक्तवानृणिको यदि।
ततो विंशतिवर्षाणि स्थितं पत्रं स्थिरं भवेत्।।

शक्तस्य संनिधावर्धो यस्य लेख्येन भुज्यते।
वर्षाणि विंशतिं यावत्तत्पत्रं दोषवर्जितम्।। [7]

samudre tu yathā lekhye mṛtāssarve'pi tatsthitāḥ।
likhitaṃ tatpramāṇaṃ tu mṛteṣvapi hi teṣu vai।।

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dṛṣṭe patre sphuṭan doṣannoktavānṛṇiko yadi।
tato viṃśativarṣāṇi sthitaṃ patraṃ sthiraṃ bhavet॥

śaktasya saṃnidhāvardho yasya lekhyena bhujyate।
varṣāṇi viṃśatiṃ yāvattatpatraṃ doṣavarjitam॥[7]

In *Yājñavalkyasmṛti* also it is said that:

A person will forgo his right in the case of immovable property if he does not take legal steps despite its encroachment by others for twenty years and ten years in the case of movable property.[8]

पश्यतोऽबृवतो भूमेर्हानिर्विंशतिवार्षिकी।
परेण भुज्यमानाया धनस्य दशवार्षिकी॥ [8]

paśyato'bṛvato bhūmerhānirviṃśativārṣikī।
pareṇa bhujyamānāyā dhanasya daśavārṣikī॥[8]

Proof of disputed document: If a doubt should exist as to the authenticity of a document, its authenticity may be established by examining the handwriting of the party, the tenor of the document, peculiar marks, circumstantial evidence and probabilities of the case. In this connection Yājñavalkya says that:

A doubtful document is to be considered valid by respective handwritings, etc., and by proofs; such as the specification of circumstances, as to time, place, etc.; production of witnesses, attesting to those facts; any peculiarity of mark, connection ie., longstanding connection between the parties as debtor and creditor and acquisition of the money.[9]

संदिग्धलेख्यशुद्धिः स्यात्स्वहस्तलिखितादिभिः।
युक्तिप्राप्तिक्रियाचिह्नसंबन्धागमहेतुभिः॥[9]

saṃdigdhalekhyaśuddhiḥ syātsvahastalikhitādibhiḥ।
yuktiprāptikriyācihnasaṃbandhāgamahetubhiḥ॥[9]

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In this connection Section 73 of Indian Evidence Act also provides that for purposes of proving the signature or handwriting of a person when disputed, his admitted signature and handwriting could be compared and used for establishing their genuineness.

The above rules regarding probative value of documents including the conditions to be satisfied for accepting the genuineness of royal documents and also the rule of Yājñavalkya, for deciding the genuineness of disputed documents exhibit the great attention that had been paid in laying down the rules, having due regard to human ingenuity to concoct documents. Yājñavalkya, cautions that the judges to be very careful in establishing the genuineness of documents. P.V. Kane refers to several historical instances of forged documents.[10]

In a judgement of honorable Supreme Court, it is mentioned that:

Sec. 60 of the Indian Evidence Act, 1872 provides that oral evidence must be direct, i.e., if it refers to a fact that could be seen, it must be the evidence of a witness who says, 'I saw it'; or if it refers to a fact which could be heard, it must be the evidence of a person who says, 'I have heard it'.[11]

If it refers to a fact that could be perceived by any other sense or in any other manner, it must be the evidence of a witness who says, ' I perceive it' (by what sense or in that manner). We find such a rule lay down by the Smṛtis also. *Manusmṛti* says that:

The evidence of what had actually been seen or heard by a person is admissible.[12]

समक्षदर्शनात्साक्ष्यं श्रवणाश्चैव सिध्दयति।। [12]

samakṣadarśanātsākṣyaṃ śravaṇāścaiva sidhdayati।।[12]

These contents compare well with the provisions of Indian Evidence Act. Sec. 64 of the Indian Evidence Act 1872 requires that documents must be proved by primary evidence except in the

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cases provided in the Act. Section 63 states that the copies made from the original by mechanical processes which in themselves ensure the accuracy of the copy, and copies compared with such copies constitute the secondary evidence. It is also stated that the copies given under the provisions oral accounts of the contents of a document given by a person who has himself seen, it is a piece of secondary evidence. Section 65 gives the circumstances under which secondary evidence is admissible in respect of the contents of a document. With regard to testifying a document Section 67 provides that when a document is alleged to have been signed or written wholly or in part by any person, the signature and handwriting to that extent of that person should be proved.

With regard to the objection regarding admissibility of documents *Bṛhaspatismṛti* says that:

Whatever defect there may be in the documents or witnesses, they should be raised at the time of trial. The judge should not hold the witnesses ineligible after they have deposed. The party about whose witnesses or documents any objection is raised in a suit cannot proceed with his case until he clears that objections.[13]

लेख्यदोषास्तु ये केचित् साक्षिणां चैव ये स्मृताः।
वादकाले तु वक्तव्याः पश्चादुक्तान् न दूषयेत्।।

लेख्यं वा साक्षिणो वाऽपि विवादे यस्य दूषिताः।
तस्य कार्यं न शोध्यं तु यावत्तन्न विशोधयेत्।। [13]

lekhyadoṣāstu ye kecit sākṣiṇāṃ caiva ye smṛtāḥ।
vādakāle tu vaktavyāḥ paścāduktān na dūṣayet।।

lekhyaṃ vā sākṣiṇo vā'pi vivāde yasya dūṣitāḥ।
tasya kāryaṃ na śodhyaṃ ttu yāvattanna viśodhayet।। [13]

Order XIII rule 1 of the Code of Civil Procedure states that the parties or their advocates, at the first hearing of the suit itself, should produce documentary evidence of every description

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in their possession which they intend to rely on if the same had already not been filed. The provisions contained in the Smṛti texts regarding production of documents and the list of witnesses is almost similar to those mentioned in the Code of Civil Procedure. Further, regarding witnesses, the rule prescribed by the Smṛtis was stricter than the one provided in the Code of Civil Procedure. The former required the party to file, immediately after the burden of proof was fixed, not only the documents on which he relied on but also the list of witnesses.

The rules prescribed by *Kātyāyanasmṛti* and *Bṛhaspatismṛti* referred to above, further provided that if there was any objection regarding the admissibility of documents or the competence of witnesses, they should be raised in the first instance and a ruling from the court should be taken on the point. If a document was allowed to be admitted in evidence without raising any objection, the party was precluded from raising the same at a later stage. This is nothing but the principle of estoppels incorporated in the Indian Evidence Act Sec.115. Similarly, regarding witnesses also, if any objection was there about their competence to give evidence, the rules provided suggest that it must be raised before they were examined. This rule, apart from being very fair to the witnesses and to the parties on whose behalf they were witnesses, also shows that the several provisions regarding disqualification of witnesses were only directory and could be waived by parties or deemed to have been waived when no objection was raised before they gave evidence, and the evidence given by such witnesses could not be discarded after it was recorded i.e., such evidence was valid in law.

Kinds of Possessioon: Possession is of two kinds: a) with Title and a) without Title. Possession which has continued for three generations is proof, even when not supported by Title; but, if it is of shorter duration, it can be admitted as proof only when supported by title. "Three generation' stands for a period of sixty

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years or more. *Bṛhaspatismṛti* says that: *Possession without a clear title does not lead to ownership.*[14]

भुक्त्या केवलया नैव भूमिः सिद्धिमवाप्नुयात्।
आगमेनापि शुद्धेन द्वाभ्यां सिध्यति नान्यथा।। [14]

bhuktyā kevalayā naiva bhūmiḥ siddhimavāpnuyāt।
āgamenāpi śuddhena dvābhyāṃ sidhyati nānyathā।। [14]

With regard to the relative importance of title and possession *Smṛticandrika* says: *Title and possession depend on each other. Vyasa and Pitamaha declare that possession in order to be valid must have five characteristics viz; it must have title behind it, must be of long standing, uninterrupted, free from protest by another person and in the presence of the opponent.*[15]

आगमो दीर्धकालश्च निश्चिद्रोऽन्यरवोड्ज्ञफतः।
प्रत्यर्थिसंनिधानश्च पञ्चांगो भोग इष्यते।।[15]

āgamo dīrdhakālaśca niścidrosnyaravoṅjñiphataḥ।
pratyarthisaṃnidhānaśca pañcāṃgo bhoga iṣyate।।[15]

There can be no branches without the root. Title is the root and Possession is the branch. This means that possession can be proof only when supported by Title. *Yājñavalkyasmṛti* says that:

Acquisition by purchase or gift is a claim superior to that of possession, but not to that of hereditary possession; but even a lawful acquisition by purchase or gift is not a strong claim if there is no proof of possession.[16]

आगमोऽभ्यधिको भोगाद् विना पूर्वक्रमागतात्।
आगमोऽपि बलं नैव भुक्तिः स्तोकाऽपि यत्र नो।। [16]

āgamo>bhyadhiko bhogād vinā pūrvakramāgatāt।
āgamo>pi balaṃ naiva bhuktiḥ stokā>pi yatra no।। [16]

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In regard to cattle, gold, lands and the rest, if one man is found in possession, while Title arising from gift and other sources indicates the ownership of another- it is Title that is more authoritative, and mere possession is no proof of ownership. The eternal rule is that possession does not create ownership; what sort of possession does create ownership has been described in *Manusmṛti* that:

If the owner gives something to somebody he uses it for ten continuous years and the owner makes no objection of any sort in such case the owner cannot have his article back. And if a person is not idiotic and more than sixteen years in age and if somebody utilizes his possession before his eyes in that case the real owner loses his right from over that thing and it goes to him who uses it.[17]

यत्किंचिद्दश वर्षाणि सन्निधौ प्रेक्ष्यते धनी। }
भुज्यमानं परैतूष्णीं न स तल्लब्दुमर्हति।।

अजडश्चेदपोगण्डो विषयो चास्य भुज्यते। }
भग्नं तद्व्यवहारेण भोक्ता तद्द्रव्यमर्हति।।[17]

yatkiṃciddaśa varṣāṇi sannidhau prekṣyate dhanī।
bhujyamānaṃ paraitūṣṇīṃ na sa tallabdumarhati।।

ajaḍaścedapogaṇḍo viṣayo cāsya bhujyate।
bhagnaṃ tadvyavahāreṇa bhoktā taddgavyamarhati।।[17]

According to *Bṛhaspatismṛti* also:

If, before somebody's eyes his property is given to another person by his coparceners or by others and if he looks on when the other person uses it, he cannot get it back.[18]

रिक्थिभिर्वा परैर्द्रव्यं समक्षं यस्य दीयते।
अन्यस्य भुंञ्जतः पश्चान्न स तल्लब्धुमर्हति।। [18]

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rikthibhirvā parairdravyaṃ samakṣaṃ yasya dīyate।
anyasya bhuṃñjataḥ paścānna sa tallabdhumarhati॥[18]

Nāradasmṛti as mentioned in *Vyavahāracintāmaṇi* says that:

When possession has been successively held, even unlawfully, by the three ancestors of the father of the present possessor, the property cannot be taken away from him, because it has gone through three lives in order.[19]

अन्यायेन तु यद् भुक्तं पित्रा पूर्वतरैस्त्रिभिः।
न तच्चक्यमपाकर्तुं क्रमात् त्रिपुरुषागतम्॥ [19]

anyāyena tu yad bhuktaṃ pitrā pūrvataraistribhiḥ।
na taccakyamapākartuṃ kramāt tripuruṣāgatam॥[19]

The law is that in the case of the first owner the proof of purchase of acquisition as gift is the strongest evidence for establishing his claim; in the case of a hereditary owner of the fourth degree, the proof of possession is the strongest evidence. But in the case of one, who inherits it from his father or grandfather, the acquisition by purchase or gift must be supported by possession. If any suit is brought against a person who has acquired a property by purchase or by receiving it as a gift, he must recover it by proving his āgama or acquisition; but not so in the case of his son or grandson; in the later case the proof of possession is stronger.

Delivery of possession was the principal mode of transferring ownership in ancient times in almost all systems of jurisprudence and so possession was given great weight as evidence of ownership. It is stated in *"Salmond's Jurisprudence"* that:

In English law until the year 1845 land could in theory be conveyed in no other method than by delivery of possession and no deed or conveyance was in itself of any effect.[20]

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Exception to Possession as proof: Where the property is in the use of men of the owner's own caste, or by his collaterals or relations, ownership is not established by Posession; it is only in cases of possession by others viz., strangers that ownership is so established. (Katyayana in *Viramitroday*, vyavahāra , p.221.) Things used through favour are never forfeited simply because those are in the possession of others.

It is stated in *Manusmṛti that:*

If somebody lends a cow, a camel, a horse or a bullock to somebody else and he in turn uses them yet the real owner never loses his claim from over those things. (Bṛhaspati also says that) *a house, field, commodity or other property having been held by another person than the owner, is not lost to the owner by mere force of possession, if the possessor stands to him in the relation of a friend, relative, or kinsman.*[21]

संप्रीत्या भुज्यमानानि न नश्यन्ति कदाचन।
धेनुरुष्ट्रो वहन्नश्वो यश्च दम्यः प्रयुज्यते।।

अस्वामिना तु यद् भुक्तं गृहक्षेत्रापणादिकम्।
सुह्रुद् बन्धुसकुल्यस्य न तद्भोगेन हीयते।।[21]

saṃprītyā bhujyamānāni na naśyanti kadācana।
dhenuruṣṭro vahannaśvo yaśca damyaḥ prayujyate।।

asvāminā tu yad bhuktaṃ gṛhakṣetrāpaṇādikam।
suhrud bandhusakulyasya na tadbhogena hīyate।।[21]

According to Bṛhaspati that:

In no case can there be acquisition through possession without a title, for women, for deities, srotriyas, or kings, or for the property of children. Bṛhaspati cautions that not to use land, not to produce a document in due time, and not to remind witnesses, these are the causes that effect the loss of one's property. Therefore one should guard one's

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means of proof with care; it is by doing so that cases on immovable or movables succeed. He further says that the acquirer should establish possession and also his title in public; his son should establish only one, viz., possession; the latter's son need not establish anything.[22]

न स्त्रीणामुपभोगः स्यात् विना लेख्यं कथञ्चन।
सुरश्रोत्रियराज्ञां तु तथा बालधने मतः।।

भूमेरभुक्तिर्लेख्यस्य यथा कालमदर्शनम्।
अस्मारणं साक्षिणां च स्वार्थहानिकराणि तु।।

तस्माद्यत्नेन कर्तव्यं प्रमाणपरिपालनम्।
तेन कार्याणि सिध्यन्ति स्थावराणि चराणि च।।

आहर्ता शोधयेद् भुक्तिमागमं चापि संसदि।
तत्सुतो भुक्तिमेवैकां तत्पुत्रादिर्न किञ्चन।। [22]

na strīṇāmupabhogaḥ syāt vinā lekhyaṃ kathañcana।
suraśrotriyarājñāṃ tu tathā bāladhane mataḥ।।

bhūmerabhuktirlekhyasya yathā kālamadarśanam।
asmāraṇaṃ sākṣiṇāṃ ca svārthahānikarāṇi tu।।

tasmādyatnena kartavyaṃ pramāṇaparipālanam।
tena kāryāṇi sidhyanti sthāvarāṇi carāṇi ca।।

āhartā śodhayed bhuktimāgamaṃ cāpi saṃsadi।
tatsuto bhuktimevaikāṃ tatputrādirna kiñcana।। [22]

When the oral or documentary evidence, is not available normally in the case of sahasa the courts could allow the parties concerned to prove their case through divine tests or ordeals. Various kinds of ordeals that were in vogue in ancient Bhārat and how they were to be conducted are discussed in the next sub head, "Ordeals and Oaths".

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End Notes

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3 Devana Bhatta. *Smṛti Chandrika,* Vol.III. (Bombay. Govt Oriental Library Series, 1914&1916) p. 151, 145

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9 Ibid., II- 92

10 Panduranga Vamana Kane. *History of Dharmaśāstrā,* Volume III. (Pune. Bhandarkar Oriental Research Institute, 1993) p.313

11 Laliteshwar Prasad v. Bateshwar Prasad—AIR 1978 SC 580-586. Rahim Khan v. Kurshid Ahmed-AIR 1975-SC 290.)

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14 Ibid., VII-30

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15 Devana Bhatta. *Smṛti Chandrika,* Vol.III. (Bombay. Govt Oriental Library Series, 1914&1916) II p.71)

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viii) Ordeals and oaths

Ordeals

To determine the truth or untruth, human evidence or ordeal (divya) used to be resorted to. When the parties to litigation were unable to prove their case by means of oral or documentary evidence, the courts could allow the parties concerned to prove their case through divine tests or ordeals. It appears that in olden days ordeals were freely employed to achieve quick results in settling the disputes. References can be found in *rgveda* that:

By throwing the accused into a river or into flame of the bundle of burning sticks or direct him to catch the burning sticks to determine the truth.[1]

मा मामेधोदशतयश्चितोधाक् प्रयद्वांबर्दी बद्धस्मनि खदतिक्षाम्।
न मगरन् नद्योमातृतमा दासा यर्दी सुसमुब्धमवाधुः।।

परशुं चिद्वि तपति शिम्बलं चिद्वि वृश्चति।
उखा चिदिन्द्र येषन्ती प्रयस्ता फेनमस्यति। छान्दोग्योपनिषद्।[1]

mā māmedhodaśatayaścitodhāk prayadvāṃbadīṃ
baddhasmani khadatikṣām।
na magaran nadyomātṛtamā dāsā yadīṃ
susamubdhamavādhuḥ।।

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parasuṃ cidvi tapati simbalaṃ cidvi vṛścati।

ukhā cidindra yeṣantī prayastā phenamasyati।
chāndogyopaniṣad।[1]

Atharvaveda says: *O soul, I set thy innate nature in the Refulgent Omnicent God, "May yogic fire pervade this physical body, and voice be absorbed in breath."*[2]

आदधामि ते पदं समिद्धेजातवेदसि।
अग्निः शरीरं वेवेष्टासुंवागपिगच्छतु।। [2]

ādadhāmi te padaṃ samiddhejātaVedāsi।
agniḥ śarīraṃ veveṣṭāsuṃvāgapigacchatu।।[2]

It is very difficult to positively view the evidentiary value of ordeals unless one imports oneself into the context of such ancient times where almost all abide by the principles of dharma and believe in superstitions. Over a period as per yuga dharma it was felt that the Ordeals adopted as a means of proof have absolutely no rational basis, but were relied purely on superstition and do not appeal to a rational mind. It may be observed that the Smṛti writers realized the changes that took place in the society and honouring the concept of yugadharma, understood the irrationality or dangers of resorting to prove a case by ordeals. This is evident from the specific provisions set out later which excluded altogether the ordeal method when human evidence was possible.

With regard to the number of ordeals there is difference in various smṛtis. It is stated in *Manusmṛti* and *Yājñavalkyasmṛti* that:

A fire test should be arranged or one should be asked to dive into the water or else he should be asked to swear by putting his hands on the head of his son or wife separately. Balance, Fire, Water, Poison, and Kosa are the five ordeals laid down for

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establishing the innocence of an accused, but these are applied in cases of serious crimes, when the accused agrees to accept himself the punishment.[3]

अग्निं वाहारयेदेनमप्सु चैनं निमज्जयेत्।
पुत्रदारस्य वाप्येनंशिरांसि स्पर्शयेत्पृथक्।।

तुलाग्न्यापो विषं कोशो दिव्यानीह विशुद्धये।
महाभियोगेष्वेतानि शीर्षकस्थेऽभियोक्तरि।।[3]

agniṃ vāhārayedenamapsu cainaṃ nimajjayet।
putradārasya vāpyenaṃśirāṃsi sparśayetpṛthak।।

tulāgnyāpo viṣaṃ kośo divyānīha viśuddhaye।
mahābhiyogeṣvetāni śīrṣakasthe'bhiyoktari।।[3]

According to Nārada as mentioned in *Vyavahāracintāmaṇi* that:

The balance, fire, water, poisons, and fifthly, consecrated water, are the ordeals ordained for the purgation of high-minded persons. Those ordeals have been ordained here by Nārada for the purpose of proving the innocence of criminals who are defendants in a lawsuit, in order that right may be discerned from wrong. If arguments also are of no avail; let the defendant undergo one of the ordeals, by fire, water, proof of virtue, and so forth, which may seem appropriate to the place, to the season, and to the strength of the defendant. [4]

घटोऽग्निरुदकं चैव विषं कोशश्च पञ्चमः।
उक्तान्येतानि दिव्यानि विशुद्धचर्थं महात्मभिः।।

संदिग्धेष्वभियुक्तानां परीक्षार्थि महात्मनाम्।
प्रोक्तानि नारदेनेह सत्यानृतविशुद्धये।।

युक्तिष्वप्यसमर्थासु शपथैरेनमर्दयेत्।
अर्थकालबलापेक्षमग्न्यम्बुसुकृतादिभिः।। [4]

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ghaṭo gnirudakaṃ caiva viṣaṃ kośaśca pañcamaḥ।
uktānyetāni divyāni viśuddhyarthaṃ mahātmabhiḥ।।

saṃdigdheṣvabhiyuktānāṃ parīkṣārthi mahātmanām।
proktāni nāradeneha satyānṛtaviśuddhaye।।

yuktiṣvapyasamarthāsu śapathairenamardayet।
arthakālabalāpekṣamagnyambusukṛtādibhiḥ।।[4]

It is stated in *Bṛhaspatismṛti* that:

The balance, fire, water, poison and fifthly, holy water; rice is prescribed as the sixth, hot gold as the seventh and the eighth is called the ploughshare; the ordeal of dharma is the ninth. All these ordeals have been set forth by the Almighty (self existent.) He further says that they should be administered according to the nature of the offence, with the aim of pointing out the good and the bad, strictly according to the rules laid down in the sacred law and not otherwise.[5]

घटोऽग्निरुदकं चैव विषं कोशश्च पञ्चमः।
षष्ठं च तण्डुलाः प्रोक्तं सप्तमं तप्तमाषकम्।।

अष्टमं कालमित्युक्तं धर्मजं नवमं भवेत्।
दिव्यान्येतानि सर्वाणि निर्दिष्टानि स्वयम्भुवा।।

अपराधानुरूपेण साध्वसाधुविवक्षया।
शास्त्रोक्तेनैव विधिना प्रदातव्यानि नान्यथा।।[5]

ghaṭo'gnirudakaṃ caiva viṣaṃ kośaśca pañcamaḥ।
ṣaṣṭhaṃ ca taṇḍulāḥ proktaṃ saptamaṃ taptamāṣakam।।

aṣṭamaṃ kālamityuktaṃ dharmajaṃ navamaṃ bhavet।
divyānyetāni sarvāṇi nirdiṣṭāni svayambhuvā।।

aparādhānurūpeṇa sādhvasādhuvivakṣayā।
śāstroktenaiva vidhinā pradātavyāni nānyathā।।[5]

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In *Śukranīti* it is stated that:

Even when yukti fails the divya (ordeal) has to be used in the investigation of cases. He observes that these methods are known to be 'divya' (दिव्य) because these were used by the great devas or gods in the discrimination of difficult cases. It is also said that the seven risis recognized them as purificatory means. He further observes that the man who through vanity of learning does not have recourse to the divyas adopted by men like 'Vasistha' is an irreligious person.[6]

युक्तिष्वप्यसमर्थासु दिव्यैरेनं विमर्दयेत्।।
यस्माद्दैवैः प्रयुक्तानि दुषकरार्थे महात्माभिः।
परस्परविशुद्धयर्थं तस्माद्दिव्यानि नामतः।।

सप्तर्षिभिश्च भिस्मार्थे स्वीकृतान्यात्मशुद्धये।
स्वमहत्त्वाश्च यो दिव्यं न कुर्यात्वज्ञानदर्पतः।
वशिष्टाद्याश्रितं नित्यं स नरो धर्मतस्करः।।[6]

yuktiṣvapyasamarthāsu divyairenaṃ vimardayet।।
yasmāddevaiḥ prayuktāni duṣakarārthe mahātmābhiḥ।
parasparaviśuddhyarthaṃ tasmāddivyāni nāmataḥ।।

saptarṣibhiśca bhismārthe svīkṛtānyātmaśuddhaye।
svamahattvāśca yo divyaṃ na kuryātvajñānadarpataḥ।
vaśiṣṭādyāśritaṃ nityaṃ sa naro dharmataskaraḥ।[6]

He further elucidates that:

In the matter of decision of cases by the divya, fire, poison, vessel, water, virtue and vice, rice and oaths- these are prescribed by the sages. The preceding ones are weightier than the succeeding and should be employed according to the importance of the case. But really all divyas are weighty.[7]

अग्निर्विषं धटस्तोयं धर्माधर्मौ च तण्डुलाः।
शपथाश्चैव निर्दिष्टा मुनिभिर्दिव्यनिर्णये।।

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पूर्वं पूर्वं गुरुतरं कार्यं दृष्ट्वा नियोजयेत्।।
लोकप्रत्ययतः प्रोक्तं सर्वं दिव्यं गुरु स्मृतम्।[7]

agniṃrviṣaṃ dhaṭastoyaṃ dharmādharmau
ca taṇḍulāḥ।
śapathāścaiva nirdiṣṭā munirbhirdivyanirṇaye।।

pūrvaṃ pūrvaṃ gurutaraṃ kāryaṃ dṛṣṭvā niyojayet।।

lokapratyayataḥ proktaṃ sarvaṃ divyaṃ guru smṛtam।[7]

According to *Yājñavalkyasmṛti:*

The ordeals for clearance from an accusation are the balance, the fire, water, poison and the kosa (drinking the water in which an idol has been washed). These are to be resorted to in the case of important disputes, and when the plaintiff has agreed to abide by the result of the ordeal in respect of the relief or the fine.

The accused, after sitting on the scale of a Balance should have himself weighed by an expert in weighing, such as, a goldsmith, etc; with colds of earth or stones equaling in weight; then marking the measured weight, he should get down from the scale. He should then declare, "O Balance! You are the abode of Truth; formerly you had been made by the Celestials, O you of auspiciousness, do you speak the Truth and free me from suspicion. The accused should address the Balance saying that, "If I have perpetrated the crime, O mother, do you bring me down, making me heavier than the weight; if I am pure, do you take me up i.e., make me lighter;"[8]

तुलाग्न्यापो विषं चैव दिव्यानीह विशुद्धये।
महाभियोगेष्वेतानि शीर्षकस्थे अभियोक्तरि।।

तुलाधारणविद्वद्भिरभियुक्तस्तुलाश्रितः।
प्रतिमानसमीभूतो लेख्यं कृत्वावतारितः।।

त्वं तुले स्त्यधामासि पुरा देवैर्विनिर्मिता।
तत्सत्यं वद कल्याणि संशयान्मां विमोचय।।

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यद्यस्मि पापकृन्मातस्ततो मां त्वमधो नय।
शुद्धश्चेद्गमयोर्ध्वं मां तुलामित्यभिमन्त्रयेत्।। [8]

tulāgnyāpo viṣaṃ caiva divyānīha viśuddhaye।
mahābhiyogeṣvetāni śīrṣakasthe abhiyoktari।।

tulādhāraṇavidvadbhirabhiyuktastulāśritaḥ।
pratimānasamībhūto lekhyaṃ kṛtvāvatāritaḥ।।

tvaṃ tule styadhāmāsi purā devairvinirmitā।
tatsatyaṃ vada kalyāṇi saṃśayānmāṃ vimocaya।।

yadyasmi pāpakṛnmātastato māṃ tvamadho naya।
śuddaścedgamayordhvaṃ māṃ tulāmityabhimantrayet।।[8]

Nārada as mentioned in *Vyavahāra Cintāmaṇi* says that:

If he rises, on being weighed for the second time, he is undoubtedly innocent. If his weight remains the same as before, or if he goes down, he cannot be acquitted.[9]

तुलितो यदि वर्धेत विशुद्धः स्यान्न संशयः।
समो वा हीयमानो वा न विशुद्धो भवेन्नरः।।[9]

tulito yadi vardheta viśuddhaḥ syānna saṃśayaḥ।
samo vā hīyamāno vā na viśuddho bhavennaraḥ।।[9]

Yājñavalkyasmṛti says that:

When the party submitting himself to an ordeal has rubbed his hands with barley corns, they should be marked; and then seven leaves of Asvattha should be placed on them; and then they should be tied with as many rounds viz., seven of thread for each leaf.[10]

करौ विमृदितव्रीहेर्लक्षयित्वा ततो न्यसेत्।
सप्ताश्वत्थस्य पर्णानि तावत्सूत्राणि वेष्टयेत्।। [10]

karau vimṛditavrīherlakṣayitvā tato nyaset।
saptāśvatthasya parṇāni tāvatsūtrāṇi veṣṭayet।। [10]

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Dharmakosa explains the importance of pippal tree that:

A special sanctity has been ascribed to the asvattha or pippala tree (ficus religiosa)."The Hindus believed that the leaves of the pippal tree were imbued with the essence of divine afflatus of the god Vishnu the preserver; and it was under the influence of this belief that they tied seven pipal-leaves one upon the other upon the hands of the accused person in order that Vishnu's essence would prevent the latter's hand from being burnt by the red-hot iron in case he was really innocent". 'Fire originates from the pippala; the pippala is the king of trees; that is the reason why a wise man should put its leaves into the hands of the person undergoing the ordeal'.[11]

Yājña*valkyasmṛti* describes in detail the fire ordeal:

The person subjected to this ordeal has to address the fire, "Oh purifying fire, thou pervade the innermost parts of all things; in my hand, tell thou the truth, like a witness who has marked whether there is virtue, or sin in me. After he has said so, a smooth red-hot lump of iron, weighing fifty panas, should be placed in both of his hands. Having taken that, he should walk slowly seven Mandalas without swerving from the line marking the Mandalas. A mandal should be known to be a circle with a diameter of sixteen fingers. The same should be the distance between each Mandala. After he has thrown away the fire, and rubbed his hands with rice, if he is found unburned he should be acquitted. If the ball falls down in the course of walking over the Mandalas, or if a doubt arises, he should carry the ball again.[12]

त्वमग्ने सर्वभूतानामन्तश्चरसि पावकः।
साक्षिवत् पुण्यपापेभ्यो ब्रूहि सत्यं कवे मम।।

तस्येत्युक्तवतो लौहं पञ्चाशत्पलिकं समम्।
अग्निवर्णं न्यसेत्पिण्डं हस्तयोरुभयोरपि।।

स तमादाय सप्तैव मण्डलानि शनैर्व्रजेत्।
षोडशाङ्गुलकं ज्ञेयं मण्डलं तावदन्तरम्।।

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मुक्त्वाग्निं मृदितव्रीहिरदग्धः शुद्धिमाप्नुयात्।।
अन्तरा पतिते पिण्डे सन्देहे वा पुनर्हरेत्।।[12]

tvamagne sarvabhūtānāmantaścarasi pāvakaḥ।
sākṣivat puṇyapāpebhyo brūhi satyaṃ kave mama।।

tasyettyuktavato lauhaṃ pañcāśatpalikaṃ samam।
agnivarṇaṃ nyasetpiṇḍaṃ hastayorubhayorapi।।

sa tamādāya saptaiva maṇḍalāni śanairvrajet।
ṣoḍaśāñgulakaṃ jñeyaṃ maṇḍalaṃ tāvadantaram।।

muktvāgniṃ mṛditavrīhiradagdhaḥ śuddhimāpnuyāt।।
antarā patite piṇḍe sandehe vā punarharet।।[12]

With regard to the ordeal of water *Yājñavalkyasmṛti* and Nārada as mentioned in *Vyavahāracintāmaṇi* describes asunder:

Having invoked the water with the Mantram, "O Varuna, protect me with Truth, " and held a person, standing navel-deep in the water, the accused should drown himself in it. Simultaneously an arrow should be discharged from that place and a strong man should be dispatched to where it falls and be made to return with the shaft. If, after his return, he sees the accused underneath the water, it establishes his innocence. Otherwise he is guilty, though only one limb of his has become visible, equally, if he has moved to a different place than that where he was first immersed.[13]

सत्येन माअभिरक्ष त्वं वरुणेत्यभिशाप्य कम्।
नाभिदघ्नोदकस्थस्य गृहीत्वोरू जलं विशेत्।।

समकालमिषुं मुक्तमानीयाअन्यो जवी नरः।
गतेअन्यस्मिन्निमग्नाङ्गं पश्येच्चेच्छुद्धिमाप्नुयात्।।

अन्यथा न विशुद्दः स्यादेकांगस्यापि दर्शनात्।
स्तानात्थन्यत्र गमनाद्यस्मिन् पूर्वं निवेशयेत्।। [13]

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satyena maabhirakṣa tvaṃ varuṇetyabhiśāpya kam।
nābhidaghnodakasthasya gṛhītvorū jalaṃ viśet।।

samakālamiṣuṃ muktamānīyāanyo javī naraḥ।
gateanyasminnimagnāṅgaṃ paśyeccecchuddhimāpnuyāt।।

anyathā na viśuddaḥ syādekāṃgasyāpi darśanāt।
stānātthanyatra gamanādyasmin pūrvaṃ niveśayet।।[13]

About the Ordeal of Poison *Yājñavalkyasmṛti* states that:

'Oh poison, you are the son of Brahma, established in the practice of Truth. Save me from this accusation; displaying the Truth, be like ambrosia unto me." Having said so, he should swallow the poison called Sarnga produced on the Himalaya Mountains. He who can digest it without convulsions, should be declared pure.[14]

त्वं विष ब्रह्मणः पुत्रः सत्यधर्मे व्यवस्थितः।
त्रायस्वास्मादभीशापात्सत्येन भव मे अमृतम्।।

एवमुक्त्वा विषं शर्ङ्गं भक्षयेद्हिमशैलजम्।
यस्य वेगैर्विना जीर्येच्चुद्धिं तस्य निवेदयेत्।। [14]

tvaṃ viṣa brahmaṇaḥ putraḥ satyadharme vyavasthitaḥ।
trāyasvāsmādabhīśāpātsatyena bhava me amṛtam।।

evamuktvā viṣaṃ śarṅgaṃ bhakṣayeddimaśailajam।
yasya vegairvinā jīryeccuddhiṃ tasya nivedayet।।[14]

In the kalikapurana, Pitamaha Smṛti, *Nāradasmṛti* and *Kātyāyanasmṛti* as mentioned in *Vyavahāra Cintāmaṇi* it is observed that:

An ordeal should be administered in case of adultery, theft, intercourse with forbidden women, in case of persons accused of a major sin, when there is a royal decree. Either the king himself

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or somebody appointed by him should administer the ordeal in the presence of learned brāhmaṇas and the elements of the state. The balance should be administered to a brāhmaṇa, fire to a kṣatriya, water to a vaisya, and poison to a sudra. When brāhmaṇas act as cowherds, merchants, artisans, actors, servants, and usurers, to them ordeals should be administered as if they were sudras.[15]

परदाराभिशापे च चौर्यागम्यागमेषु च।
महापातकशस्तेषु स्याद्दिव्यं नृपशासने।।

प्रत्यक्षं दापयेद्दिव्यं राजा वाधिकृतोअपिवा।
ब्राह्मणानां श्रुतवतां प्रकृतीनां तथैव च।।

ब्राह्मणस्य धटो देयः क्षत्रियः क्षत्रियस्य हुताशनः।
वैश्यस्य सलिलं देयं शूद्रस्य विषमेव च।।

गोरक्षकान् वाणिजकान् तथा कारुकुशीलवान्।
प्रेष्यान् वार्धुषिकांश्चैव ग्राहयेच्छूद्रवद् द्विजान्।।[15]

paradārābhiśāpe ca cauryāgamyāgameṣu ca।
mahāpātakaśasteṣu syāddivyaṃ nṛpaśāsane।।

pratyakṣaṃ dāpayeddivyaṃ rājā vādhikṛtoapivā।
brāhmaṇānāṃ śrutavatāṃ prakṛtīnāṃ tathaiva ca।।ps

brāhmaṇasya dhaṭo deyaḥ kṣatriyaḥ kṣatriyasya
hutāśanaḥ।
vaiśyasya salilaṃ deyaṃ śūdrasya viṣameva ca।।NS

gorakṣakān vāṇijakān tathā kārukuśīlavān।
preṣyān vārdhuṣikāṃścaiva grāhayeccūdravad dvijān।।[15]

It may be noted that the profession is given more importance than the nomenclature of cast. A person is identified by the

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profession he currently follows. If a *brāhmi*, an intellectual undertakes a profession connected to the nomenclature of a sudra or vaisya he will be treated for all purposes as sudra or vaisy respectively as the case may be. Kātyāyana as mentioned in *Vyavahāracintāmaṇi* suggests that:

One should, however, always avoid ordeals for men who are afflicted by diseases.[16]

दिव्यं तु वर्जयेन्नित्यमार्तानां तु गदैर्नृणाम्।[16]

divyaṃ tu varjayennityamārtānāṃ tu gadairnṛṇām।[16]

According to Yājñavalkya :

Neither an ordeal by means of a plough, nor one by means of poison, nor one by means of a balance, should be resorted to, where the subject matter of the suit is valued at less than a thousand panas. But at all times, in the case of offences affecting the king, and in the case of sins of the first degree the plaintiff or the defendant, as the case may be should undergo an ordeal, with his mind and body pure.[17]

ना सहस्राद्धरेत्फालं न विषं न तुलां तथा।
नृपार्थेष्वभिशापे च वहेयुः शुचयस्तथा।। [17]

nā sahasrāddharetphālaṃ na viṣaṃ na tulāṃ tathā।
nṛpārtheṣvabhiśāpe ca vaheyuḥ śucayastathā।।[17]

About the order of Preference he further says that:

The method of proving the case of a party by ordeal should be resorted to only when human evidence viz., documents, witnesses and possession or in other words, documentary, oral and possessory evidence established by oral or documentary evidence is not available.[18]

प्रमाणं लिखितं भुक्तिः साक्षिणश्चेति कीर्तितम्।
एषामन्यतमाभावे दिव्यान्यतममुच्यते।।[18]

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pramāṇaṃ likhitaṃ bhuktiḥ sākṣiṇaśceti kīrtitam।
eṣāmanyatamābhāve divyānyatamamucyate।।[18]

In *Dharmakośa* it is stated that:

In disputes regarding immoveable property, ordeals should be rejected and only documentary and possessory evidence are to be accepted. In the case of Sahasa (crimes of violence) and such other disputes, wherever there is no possibility of existence of witnesses, Divya (ordeal) method should be resorted to.[19]

स्थावरेषु विवादेषु दिव्यानिपरिवर्जयेत्।
साक्षिभिर्लिखितेनाथ भुक्त्या चैतान् प्रसाधयेत्।।

यस्मिन् यस्मिन् विवादे तु साक्षिणां नास्ति संभवः।
साहसेषु च सर्वेषु तत्र दिव्यानि दापयेत्।।[19]

sthāvareṣu vivādeṣu divyāniparivarjayet।
sākṣibhirlikhitenātha bhuktyā caitān prasādhayet।।

yasmin yasmin vivāde tu sākṣiṇāṃ nāsti saṃbhavaḥ।
sāhaseṣu ca sarveṣu tatra divyāni dāpayet।।[19]

Before recording the oral evidence of a witness, who had come forward to give evidence in any dispute, the Smṛti texts provided that an oath should be administered to the witness. In this regard *Bṛhaspatismṛti* says that:

After putting off his shoes and his turban, he should stretch out his right hand and declare the truth, taking in his hand, gold, cow dung or a few blades of sacred grass (Kusha), as the case may be.[20]

विहायोपानदुष्णीषं दक्षिणं पाणिमुद्धरेत्।
हिरण्यं गोशकृद्धर्भान् समादाय ऋतं वदेत्।।[20]

vihāyopānaduṣṇīṣaṃ dakṣiṇaṃ pāṇimuddharet।
hiraṇyaṃ gośakṛddharbhān samādāya ṛtaṃ vadet।।[20]

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The above rule required a witness to be put on oath placing his hand on any article considered sacred by him. This was with the object of introducing certain amount of seriousness and solemnity into the trial and to impress upon the witness that he should speak the truth. This requirement of putting a witness on oath or solemn affirmation is also the law, now in force vide sec. 4 of the Indian Oaths Act. 1969. Section 6(1) of that Act, which prescribes the form of oath and affirmation, reads, "All oaths and affirmations made under section 4 shall be administered according to such one of the forms given in the Schedule as may be appropriate to the circumstances of the case. Provided that if a witness in any judicial proceeding desires to give evidence on oath or solemn affirmation in any form common amongst, or held binding by, persons of the class to which he belongs, and not repugnant to justice or decency, and not purporting to affect any third person, the court may if it thinks fit, not withstanding anything herein before contained, allow him to give evidence on such oath or affirmation.

The schedule to this Act sets out the form to take oath in the name of God. In view of this provision, a person can also take oath according to any recognized custom or usage subject to the conditions prescribed therein. The solemn affirmation provided as an alternative to oath under the Act is in substance the same though not taken in the name of God. Thus the necessity of putting a witness on oath recognized under ancient law is also accepted under this Act.

According to Manu: *A brāhmaṇa may swear by truth, Kṣatriya by his vehicles and weapons, a Vaisya by his cows, granary and gold and a Sudra should swear by all sins.*[21]

सत्येन शापयेद्विप्रं क्षत्रियं वाहनायुधैः।
गोबीजकाञ्चनैर्वैश्यं शूद्रं सर्वैस्तु पातकैः।।[21]

satyena śāpayedvipraṃ kṣatriyaṃ vāhanāyudhaiḥ।
gobījakāñcanairvaiśyaṃ śūdraṃ sarvaistu pātakaiḥ।।[21]

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Nārada also agrees with the same view Bṛhaspati says that:

Truth, a chariots and weapons, cows, seeds and gold venerable gods and Brahmans, the heads of sons or wives are the oaths.' He further says that these are the oaths, which have been prescribed in minor matters; but in case of violence and in case of a curse ordeals are the adequate means of purgation.[22]

सत्यं वाहनमस्त्रं च गोबीजकाञ्चनानि च।
देवब्राह्मणपादाश्च पुत्रदारशिरांसि च।।

एते च शपथाः प्रोक्ता मनुना स्वल्पकारणे।
साहसेअप्यभिशापे च दिव्यानि तु विशोधनम्।।[22]

satyaṃ vāhanamastraṃ ca gobījakāñcanāni ca।
devabrāhmaṇapādāśca putradāraśirāṃsi ca।।

ete ca śapathāḥ proktā manunā svalpakāraṇe।
sāhaseapyabhiśāpe ca divyāni tu viśodhanam।।[22]

Manu says that: *If there is a case without a witness and the two parties contradict each other and the king is not in a position to know the reality he may ask the parties to take oaths and swear.*[23]

असाक्षिकेषु त्वर्थेषु मिथो विवादमानयोः।
अविन्दंस्तत्त्वतः सत्यं शपथेनापि लभ्येत्।।[23]

asākṣikeṣu tvartheṣu mitho vivādamānayoḥ।
avindaṃstattvataḥ satyaṃ śapathenāpi labhyet।।[23]

According to P.V. Kane,

"That ordeals had attained great vogue in the early centuries of the Christian era is shown by the Mrcchakatika Act IX. 43 (where the ordeals of poison, water, balance and fire are expressly named) and by Bana who mentions the same four in Kadambari, para 47. Among the digests and commentaries the Mitaksara, the Smṛticandrika,

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the Divyatattva of Raghunandana, the Vyavahāramayukha and the Vyavahāraprakasa contain the most elaborate treatment of ordeals. Divya is defined as 'that which decides a matter (in dispute) not determined by human means of proof' (Vyavahāramayukha), or 'that which decides what cannot be or is not to be decided by human means of proof'.[24]

तत्र मानुषप्रमाणानिर्णेयस्यापि निर्णायकं यत्तद्दिव्यमिति लोकप्रसिद्धम्।
अपिना मानुषप्रमाणसत्त्वेपि यत्र चैव धटाद्यङ्गीकारस्तत्राप्येतद्भवतीति सूचितम्।[24]

tatra mānuṣapramāṇānirṇeyasyāpi
nirṇāyakaṃ yattaddivyamiti lokaprasiddham।
apinā mānuṣapramāṇasattvepi yatra caiva
dhaṭādyaṅgīkārastatrāpyetadbhavatīti sūcitam।[24]

P.V. Kane mentions Medhatithi's commentary on Manu VIII. 116 discusses the question whether ordeals can be relied upon for the discovery of truth:

वत्सस्य ह्यभिशस्तस्य पुरा भ्राता यवीयसा।
नाग्निर्ददाह रोमापि सत्येन जगतः स्पशः।। *Manusmṛti VIII,* [116]

vatsasya hyabhiśastasya purā bhrātā yavīyasā।
nāgnardadāha romāpi satyena jagataḥ spaśaḥ।

In the time of yore when the sage Vatsa was charged by his younger brother (that he was not born of his own father but he was born of a sudra) he entered into the fire. The fire god a testifier of auspicious and inauspicious deeds of the whole world did not burn even a single hair on his body due to his truth.

The objection is raised that fire and water are natural forces that act in a uniform way and are not intelligent beings which may change their minds by an appeal to them. Therefore, the objector says, ordeals and oaths are like magic and are only meant to frighten the parties into telling the truth. It is further objected that thieves may (by some trick) not be burnt in the fire ordeal and good men are seen to suffer

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burns. The reply is the usefulness of ordeals cannot be negative by these examples of failures, as they are not frequent and as even direct perception and inference sometimes lead to uncertain results. No one, however, says that these latter should not be relied upon. Just as one relies on witnesses in deciding a matter (who may for aught one knows be telling lies), so reliance can be placed on ordeals."[25]

A court scene is depicted in a well known drama *Mṛchchakaṭikam* authored by Sūdraka. In that Cārudatta hero of the play pathetically repeats:

Mytreya what it is today "9-29 in the sky? "If a decision solicited in my case after reference to the ordeals of poison, water, balance and fire, the saw might have been applied to my body today. When, on the other hand, you kill me, a Brahmin on the strength of the words of an enemy; you shall fall into hell together with your sons and grandsons.[26]

विषसलिलाग्नि प्रार्थिते मे विचारे क्रकचमिह शरीरे वीक्ष्य दातव्यमद्य।

अथ रिपुवचनाद्वा ब्राह्मणं मां निहंसि पतसि नरकमध्ये पुत्र पौत्रैस्समेतः।। [26]

viṣasalilāgni prārthite me vicāre krakacamiha śarīre vīkṣya dātavyamadya।

atha ripuvacanādvā brāhmaṇaṃ māṃ nihaṃsi patasi narakamadhye putra pautraissametaḥ।। [26]

The drama portrays the social context obtaining at that time indicating the evidentiary value given to ordeals. Ordeal used to be normally employed to arrive at the truth in disputes relating to the criminal offences. How the subject of crime and punishment was dealt in ancient Bhārat is discussed in the next sub head, crime and punishment.

End Notes

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ix) Crime and Punishment in Ancient Bhārat

Background:

Even in Vedic period effective attempts were made to ensure the well being of the society. The concept of welfare state was well appreciated in ancient Bhārat and it appears sufficient care was taken to ensure the same. This aspiration must have contributed to give deep thought to the process of eradicating the offences in the society. The Vedic period throws much light on the subject of crime and the relative punishment. The Veda is the authority in many respects. It is the fountain head of the subsequent knowledge that followed and continues to inspire human literature. Hence the subject of crime and punishment and how it was dealt can be traced in them. The prayers to various gods to release from the sin suggest the path for the code of conduct. Not only various sins described here but also the human weakness which is the cause of the sin is explained. *ṛgveda* says that:

"He who knows our actions good or bad, can lead us to righteous path. We are constantly struggling with the sins. Hence, our request to you is to release us from the sins."[1]

अग्ने नय सुपथा राये अस्मान्विश्वानि देव वयुवानि विद्वान्।
युयोध्वस्मज्जुहुराणमेनो भूयिष्ठां तेनमउक्तिं विधेम।। [1]

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agne naya supathā rāye asmānviśvāni deva
vayuvāni vidvān।

yuyodhvasmajjuhurāṇameno bhūyiṣṭhāṃ
tenamauktiṃ vidhema॥[1]

The Veda ordains some duties which are Vidhis and prevents some deeds which are known as nishedhas. It does not mention the word 'Aparadha' but the violation of the order is mentioned by various terms. The institution of prāyaścittta, is as old as the Vedās. There are so many references to expiation in the different Vedās which go to show that the nucleus of the institution was conceived and followed from a very early time of the Indian society. The genesis of the institution might be sought in the prayers to the *ṛgvedc* Gods in general and Varuna in particular for forgiveness and mercy in case any transgression was committed. A considerable length of time must have elapsed before the details could be multiplied with reference to the nucleus of the original concept of penance.

P.V. Kane in his *History of Dharmasastra* discusses sins and prāyaścittā under civil law. He says:

It is very difficult to define sin. In a general way it may be said that it is an act which is regarded as a willful rebellion against or disobedience of some law supposed to be laid down by God or Revelation[2]

According to his observation the idea of sin in *ṛgveda* is bound up with the conception of Ṛta. Many of the principal Gods of the Vedic pantheon are described as the guardians, promoters or charioteers of Ṛta. There are references to Mitra and Varuna who rule over all the worlds by Ṛta. The concept of guilt is very clear in Vedās. There are many hymns. Containing prayers to various gods requesting them to free the sinners from the sin. The *ṛgveda* states that:

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The wise made seven limits to the human beings violating even one of them leads to incur Sin.[3]

सप्त मर्यादाः कवयस्ततक्षुस्तासामेकामिदभ्यंहुरोगात्।
अयोर्वा स्कम्ब उपमस्य नीळे पथां विसर्गे धरुणेषुतस्थौ।।[3]

sapta maryādāḥ
kavayastatakṣustāsāmekāmidabhyaṃhurogāt।
ayorvā skamba upamasya nīḷe pathāṃ visarge
dharuṇeṣutasthau।।[3]

The *Nirukta* describes the seven sins as:

Theft, Violating an elder's bed, murder of a Brahmana, murder of a foetus, drinking of liquor, repetition of an offence, telling lie as to a sinful matter.[4]

स्तेयं, तल्पारोहणम् ब्रह्महत्य, भ्रूणहत्य, सुरापान, दुष्कृतस्य कर्मणः पुनः पुनः सेवा, पोतके अनृतोद्यानि इति।[4]

steyaṃ, talpārohaṇam brahmahatya, bhrūṇahtya,
surāpāna, duṣkṛtasya karmaṇaḥ punaḥ punaḥ sevā,
potake anṛtodyāni iti।[4]

Indra is described as a king who fights against enemies, where as Varuna is described as a lord who seriously views the crimes committed by the people and always found ready with noose to arrest the people. The characterstics of Varuna are thus described by Macdonell in his treatise *'History of Sanskrit Literature'*. He says that:

"Varuna's omniscience is often dwelt on. He knows the flight of the birds in the sky, the path of ships in the ocean, the course of the far-travelling wind. He beholds all the secret things that have been or shall be done. He witnesses men's truth and falsehood. No creature can even wink without him. As a moral governor Varuna stands far above any other deity. His wrath is roused by sin, which is the infringement of his

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ordinances, and whom he severely punishes. There in fact no hymn to Varuna in which the prayer for forgiveness of guilt does not occur. The fetters with which he binds sinners are often mentioned".[5]

On going through the Vedic literature it may be noticed that the internal peace, law & order was taken care of by Varuna, while Indra with his team engaged in fighting with external forces. Now coming to the nature of crimes, there are many references to various crimes in *Atharvaveda*. A few are discussed here.

Arrest and imprisonment to the offenders is also found in *Atharva Veda*. If the offenders do not get reformed then they are to be punished. A verse describes how the criminal is to be arrested and confined. And it may be noticed that social security was given much importance in Samhitas. It is advised to give protection to the children of sinners. These verses focus on the mankind even towards criminals who were preached properly due to which they change their attitude. Thus it appears that a proper counseling is also provided in Vedās. In this regard some of the verses from *Atharvaveda* are given hereunder:

पश्याम ते वीर्यंजातवेदः प्रणो ब्रूहि यातुधानान् नृचक्षः।
त्वया सर्वे परितप्ताः पुरस्तात् त आ यन्तु प्रब्रुवाणा उपेदम्।।

त्वमग्ने यातुधानानुपबद्धो इहा वह।
अथैषामिन्द्रो वज्रोणापि शीर्षाणि वृश्चतु।।

यातुधानस्य सोमप जहि प्रजां नयस्व च।
नि स्तुवानस्य पातय परमक्ष्युतावरम्।

यदुवक्थानृतं जिह्वया वृजिनं बहु।
राज्ञस्त्वा सत्यधर्मणो मुञ्चामि वरुणादहम्।। [6]

paśyāma te vīryaṃ'jātavedaḥ praṇo brūhi yātudhānān nṛcakṣaḥ।
tvayā sarve paritaptāḥ purastāt ta ā yantu prabruvāṇā upedam।।

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tvamagne yātudhānānupabaddho ihā vaha।
athaiṣāmindro vajroṇāpi śīrṣāṇi vṛścatu॥

yātudhānasya somapa jahi prajāṃ nayasva ca।
ni stuvānasya pātaya paramakṣyutāvaram।

yaduvakthānṛtaṃ jihvayā vṛjinaṃ bahu। rājñastvā
satyadharmaṇo muñcāmi varuṇādaham॥[6]

O learned preacher, we behold thy strength; O preacher unto mankind, instruct well the impious, who torment. Reformed through thy noble teachings, repenting for their sins, let all approach thee here, making confession of their faults.

O learned preacher, bring hitherward to the jail, bound and chained, the terrorisers of men, who do not reform themselves in obedience to thy advice. Let the king afterward tear their heads off with his sword.

O chief preacher, approach the children of sinner and bring them on the path of righteousness. Lower down with humility their right and left eyes, with thy moral instruction, when they sing thy praise in gratitude.

O King! Whatever falsehood, thou hast uttered with thy tongue, is a great sin. I liberate thee from future punishment by the just Supreme God.[6] (Here 'I' refers to Royal Priest' says Devichand, in his commentary on *Atharvaveda*.)

The word 'Vrijina' is opposite to 'Ṛta' says P.V.Kane. Here Vrijina is used in the sense of Sin. Speaking opposite to Ṛta is Sin. The king should abide by the laws. He is under the control of Varuna. Hence he should carry out the duties as per the order. Therefore the royal priest prays tributes to Varuna for the well being of the King. It is the duty of a Purohita who should take care of the King and to lead him to a righteous path. The importance of Purohita which is seen in post Vedic literature has its seeds in Samhita Literature itself. A verse in *Atharvaveda* says that:

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नमस्ते राजन् वरुणास्तु मन्यवे विश्वं ह्यऽग्र निचिकेषि द्रुग्धम्।
सहस्रमन्यान् प् सुवामि साकं शतं जीवाति शरदस्तवायम्। [7]

namaste rājan varuṇāstu manyave viśvaṃ hya'gra
nicikeṣi drugdham।

sahasramanyān psuvāmi sākaṃ śataṃ jīvāti
śaradastavāyam। [7]

"O Lord Varuna! Salutation to thee you are an angry one. You know every malicious person. I lead a thousand others to the righteous path. May this king live long for hundred years".[7]

Here Purohit prays for the welfare of his king. The robbery is also described *in Atharvaveda*. A devotee prays Indra to protect the traders being a leader to them on their way. In this Indra is addressed as a merchant. He is asked to drive away the evil, wild beast, and high way robber. *Atharvaveda* lays a rule that the criminals are to be caught red handed and should be punished in accordance with the offence.

इन्द्रमहं वणिजं चोदयामि सन ऐतु पुरएता नो अस्तु।
नुदन्न रातिं परिपन्थिनं मृगं स ईशानो धनदा अस्तु मह्यम्।।

पुनः कृत्यां कृत्याकृते हस्तगूह्य परा णय।
समक्षमस्मा आ धेहि यथा कृत्याकृतं हनत्।। [8]

indramahaṃ vaṇijaṃ codayāmi sana aitu
puraetā no astu।

nudanna rātiṃ paripanthinaṃ mṛgaṃ sa īśāno
dhanadā astu mahyam।।

punaḥ kṛtyāṃ kṛtyākṛte hastagūhya parā ṇaya।
samakṣamasmā ā dhehi yathā kṛtyākṛtaṃ hanat।। [8]

Catch hold again and again red-handed, of a violent person committing mischief and put him in solitary confinement (Custody.)

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Tell him clearly on his face, how the criminals who take the life of others are liable for capital punishment."[8]

Post Vedic Period: A long interval separated the Vedās and the Dharmasūtrās which again were followed by the Dharmaśāstrās after a considerable period. But even in the Dharmasūtrās we find a more or less elaborate treatment of expiation with considerable details. Almost one-third of the *Gautama Dharmasūtrās* has been devoted to the treatment of expiation. The most significant and an eternal rule, advocated by Gautama was:

बहुषु गुरु गुरूनि लघुषु लघूनि. [9]

bahuṣu guru gurūni laghuṣu laghūni. [9]

"For great sins difficult penances, and for trivial faults easy ones."[9]

The above doctrine was variously elaborated by the subsequent writers like āpastamba who provided that penance should be prescribed with reference to the time, place, age and the sense of the sinner and also the nature of the sin. The concept that the punishment should be proportionate to the gravity of the offence dates back to the Vedic period. Various offences of small and big were described and punishments including death sentence were also prescribed in that period. The persons who are responsible for heinous sin or sins analogous thereto are to become out-cast. *The abettors also are liable to identical penances. Amongst the abettors who contribute most to the accomplishment of the act obtain a greater share of the result.*[10]

With regard to the factors to be considered before awarding a punishment *Manusmṛti* states that:

The guilty should be punished only after fully considering the magnitude of his crime, the place and time of crime, the physical and monetary condition of the guilty and the nature of the crime committed. If a punishment is awarded superseding Dharma it kills

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the name and fame of the administrator. It leads him to hell therefore it should be avoided.[11]

अनुबन्धं परिज्ञाय देशकालौ च तत्त्वतः।
सारापराधौ चालोक्य दणडं दण्ड्येषु पातयेत्।।

अधर्मदण्डनं लोके यशोघ्नं कीर्तिनाशनम्।
अस्वर्ग्यं च परत्रापि तस्मात्तत्परिवर्जयेत्।।[11]

anubandhaṃ parijñāya deśakālau ca tattvataḥ।
sārāparādhau cālokya daṇaḍaṃ daṇḍyeṣu pātayet।।

adharmadaṇḍanaṃ loke yaśodhnaṃ kīrtināśanam।
asvargyaṃ ca paratrāpi tasmāttatparivarjayet।।[11]

It throws light on the principle that the guilt or the offence alleged to have committed should be proved beyond reasonable doubt before imposing any punishment unlike the case of civil wrong where preponderance of circumstances can be a base to arrive at decision.

Daṇḍā Niti: In post Vedic literature Kautilya's *Arthaśāstra* is a systematic work which discusses the civil and criminal law in two chapters Dharmasthiyam and Kantakasodhanam respectively. An essential duty of government is maintaining law and order in the society. Kautilya explains that it includes both maintenance of social order as well as the preventive steps against criminal activity and also award due punishment to those who indulge in such activity. Thus the *Arthaśāstra* deals with the civil law and criminal law. It deals with the substantive and procedural law of legal system.

ṛgveda explains daṇḍā as:

Daṇḍā literally means 'a stick or staff' of a tree for driving cattle.[12]

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दण्डा इवेद् गो अजनास आसन् परिच्छिन्ना भरता अर्चकासः। [12]

daṇḍā ived go ajanāsa āsan paricchinnā
Bhāratā arcakāsaḥ। [12]

But it came to mean also 'the power of control and punishment' i.e., it conveys the power of the king or supreme ruler called 'Daṇḍadhara' to dispense justice and to punish wrong-doers. The Gautama Dharma sutara, XI. 28 states that the word 'Daṇḍa' is derived by the wise from the root 'dam' (to control) conveys the idea of controlling or suppressing. The king should control by means of daṇḍa those who observe no restraint. The conception of Daṇḍa is therefore this, that the state's will and coercive power keep the individual and nation within the bounds of dharma, punish for breaches and affect the good of the whole.

Daṇḍaniti is the science of Government. The association of Daṇḍa (punishment) with the king, in early law is to be found in the obedience to Dharma, and, it is described as Dharma itself created in that shape by Brahman. Daṇḍaniti or the laws about punishment is from very early times treated as a most essential part in the exercise of the powers of a King. But Daṇḍa is to be applied according to established principles of dharma. The King used to exercise his powers to impose punishment on those who transgress the path of Dharma and to provide protection to those who follow dharma. Kautilya refers to it in the *The Kautiliyarthaśāstra* that:

Daṇḍa is one of the seven elements that constitute a state. viz. svamin ruler of sovereign, amatya minister, janapada or rastram the territory of the state and its people, durga fortified city or capital, kosa accumulated wealth in ruler's treasury, daṇḍa *army, mitra friends or allies. These seven are called angas or prakrutis.* [13]

स्वाम्यमात्य जनपद दुर्ग कोश दण्डमित्राणि प्रकृतयः।[13]
svāmyamātya janapada durga kośa daṇḍamitrāṇi
prakṛtayaḥ।[13]

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According to Manu the ultimate sanction behind the state is force. If it is not used, the alternative is the law of the jungle ie., matstyanyaya. It is Daṇḍa, physical punishment which rules over all the subjects; it is Daṇḍa which protects them; when all else are sleeping, Daṇḍa keeps awake; law is nothing but Daṇḍa itself. It is the primary responsibility of the king to punish and bring to the proper path castes and guilds when they swerve from their dharma. Manu says that:

दण्डः शास्ति प्रजाः सर्वां दणड एवाभिरक्षति।
दणडः सुप्तेषु जागर्ति दण्डं धर्मं विदुर्बुधाः।।
सर्वो दण्डजितो लोको दुर्लभो हि शुचिर्नरः।
दण्डस्य हि भयात्सर्वं जगद्भोगाय कल्पते।।.[14]

daṇḍaḥ śāsti prajāḥ sarvāṃ daṇaḍa evābhirakṣati।
daṇaḍaḥ supteṣu jāgarti daṇḍaṃ dharmaṃ
vidurbudhāḥ।।
sarvo daṇḍajito loko durlabho hi śucirnaraḥ।
daṇḍasya hi bhayātsarvaṃ jagadbhogāya kalpate।।.[14]

It is scepter which rules over the subjects. It protects them.It is scepter which keeps awake while everybody sleeps. The wise regard the sceptre to be Dharma itself. The virtuous persons are rare. The rest of the society is regulated by the punishment only. All creatures undergo through what they deserve only due to the fear of punishment.[14]

Same view was expressed in *Mahābhārat*:

दण्डः संरक्षते धर्मं तथैवार्थं जनाधिप।
कामं संरक्षते दण्डस्त्रिवर्गो दण्ड उच्यते।।

धर्मवर्त्मनि संस्थाप्य प्रजा वर्तेत धर्मतः।
दुष्टस्य दण्डः सुजनस्य पूजा न्यायेन कोष्टस्य च संप्रवृद्धिः।

अपक्षपातोऽर्थिषु राष्ट्ररक्षा पञ्चैव यज्ञाः कथिता नृपाणाम्।। [15]

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daṇḍaḥ saṃrakṣate dharmaṃ tathaivārthaṃ janādhipa।
kāmaṃ saṃrakṣate daṇḍastrivargo daṇḍa ucyate।।

dharmavartmani saṃsthāpya prajā varteta dharmataḥ।
duṣṭasya daṇḍaḥ sujanasya pūjā nyāyena koṣṭasya ca saṃpravṛddhiḥ।

apakṣapāto'rthiṣu rāṣṭrarakṣā pañcaiva yajñāḥ kathitā nṛpāṇāṃ।।[15]

Punishment protects Dharma, Artha and Kama (the law, the lawful wealth and lawful desires of human beings) and hence it is called 'trivargarupa' (त्रिवर्गरूपः) (symbol of Dharma, Artha and Kama). It is further said that while ensuring that all people should follow the principles of Dharma the King himself also should follow the same path of Dharma. To punish the wicked, to protect the good, to enrich the treasury by just methods, to be impartial towards the litigants and to protect the kingdom- these are the five Yājña s (selfless duties) to be performed by a king.[15]

It is further said in *Mahābhārat:*

राजदण्डभयादेके पापाः पापं न कुर्वन्ते।
यमदण्डभयादेके परलोकभयादपि।।

परस्परभयादेके पापाः पापं न कुर्वते।
एवं सांसिद्धिके लोके सर्वे दण्डे प्रतिष्ठितम्।।[16]

rājadaṇḍabhayādeke pāpāḥ pāpaṃ na kurvante।
yamadaṇḍabhayādeke paralokabhayādapi।।

parasparabhayādeke pāpāḥ pāpaṃ na kurvate।
evaṃ sāṃsiddhike loke sarve daṇḍe pratiṣṭhitam।।[16]

Some people avoid committing sin on account of threat from King's authority to punish; some do not dare to commit sin on account

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of yama to punish in the other world; some avoid committing sin on account of reciprocal threat. This threefold threat operates as restraint on criminal tendency. It is the prerogative of the King; to punish impartially; hence everything is inbuilt in daṇḍa the punishment.[16]

Kautilya points out that punishment or threat of punishment is not to be viewed only in its prohibitive aspect. It establishes law and order in society and thus indirectly brings about a natural tendency in the average individual to obey the law of the land, which also results in not using the force frequently. It ultimately secures proper progress in religion, philosophy and economic well-being, so necessary for social stability. It is stated in *The Kautiliya Arthaśāstra* that:

It is the power of punishment alone, when exercised impartially in proportion to the guilt, and irrespective of whether the person punished is the King's son or an enemy, that protects this world and the next.[17]

दण्डो हि केवलो लोकं परं चेमं च रक्षति।
राज्ञा पुत्रे च शत्रौच यथादोषं समं धृतः।।[17]

daṇḍo hi kevalo lokaṃ paraṃ cemaṃ ca rakṣati। rājñā putre ca śatrauca yathādoṣaṃ samaṃ dhṛtaḥ।।[17]

Thus the entire social well-being is thus dependent upon it. Manu goes to the extent of declaring that:

स राजा पुरुषो दण्डः स नेता शासिता च सः।
पिता आचार्यः सुहृन्माता भार्या पुत्रः पुरोहितः।
नादण्ड्यो नाम राज्ञे अस्ति यः स्वधर्मे न तिष्ठति।।

तं देशकालौ शक्तिं च विद्यां चावेक्ष्य तत्त्वतः।
यथार्हतः संप्रणयेन्नरेष्वन्यायवर्तिषु।। [18]

sa rājā puruṣo daṇḍaḥ sa netā śāsitā ca saḥ।
pitā ācāryaḥ suhranmātā bhāryā putraḥ purohitaḥ।

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nādaṇḍyo nāma rājñe asti yaḥ svadharme na tiṣṭhati।।

taṃ deśakālau śaktiṃ ca vidyāṃ cāvekṣya tattvataḥ।

yathārhataḥ saṃpraṇayennareṣvanyāyavartiṣu।।[18]

it is Daṇḍa *who is the real King, the real leader and the real protector. The king should not spare even parents, acarya, wife, son, friend, religious priest if they do not maintain their Dharma. The king should certainly punish them. The King should award punishment befitting to the criminal acts after fully considering the place, time and capacity and fully* looking into the scriptures.[18]

In *Śukranīti* it is stated that:

सूचकस्तोभकाभ्यां वा श्रुत्वा चैतानि तत्त्वतः।
शास्त्रेणानिन्दितस्त्वर्थी नापि राज्ञा प्रचोदितः।।

आवेदयति यत्पूर्वं स्तोभकः स उदाहृतः।
नृपेण विनियुक्तो यः परदोषानुवीक्षणे।।
नृपं संसूचयेज्ज्ञात्वा सूचकः स उदाहृतः। [19]

sūcakastobhakābhyāṃ vā śrutvā caitāni tattvataḥ।
śāstreṇānaninditastvarthī nāpi rājñā pracoditaḥ।।

āvedayati yatpūrvaṃ stobhakaḥ sa udāhṛtaḥ।
nṛpeṇa viniyukto yaḥ paradoṣānuvīkṣaṇe।।

nṛpaṃ saṃsūcayejjñātvā sūcakaḥ sa udāhṛtaḥ।[19]

King used to get information about the crimes in the society through Suchakas and Stobhakas. Suchakas are the employees of the King and Stobhakas are those who volunteer to provide such information to get rewards from the King.[19]

It lays down that the award of punishment must be regulated by a consideration of the motive and nature of the offence, the time and place, the strength, age, conduct (or duties), learning

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and monetary position of the offender and by the fact whether the offence is repeated. This provision hithlights that the Dharmaśāstrās hold the views that the same punishment need not be inflected for the same offence irrespective of the antecedents, characteristics or physical and mental condition of the offender.

Here a court scene of King Ravana of Lanka as described in Valmiki's *śrīmadrarāmāyaṇa* may be referred. When Hanuman, as accused on account of damaging Ashokavana, was brought into the court of Lanka, Rāvana in a fit of rage imposed the punishment of death.

क्षमस्व रोषं त्यज राक्षसेन्द्र प्रसीद मद्वाक्यमिदं शृणुष्व।
वधं न कुर्वन्ति परावराज्ञा दूतस्य सन्तो वसुधाधिपेन्द्राः।।[20]

kṣamasva roṣaṃ tyaja rākṣasendra prasīda
madvākyamidaṃ śṛṇuṣva।
vadhaṃ na kurvanti parāvarājñā dūtasya santo
vasudhādhipendrāḥ।।[20]

Rāvana's brother Vibhishana advises the King that Hanuman had come as an ambassador from Rama and enjoys diplomatic immunity, hence such sentence could not be imposed on him.[20]

Rāvana then commuted the death sentence into a sentence of disfiguration of his tail by burning (anga vaikalya). This court scene of ancient times only shows that even in such remote past the privileges of diplomats and the doctrine of proportionality of punishment were honoured which are of modern doctrines recently developed.

They always took extenuating circumstances into account. It is stated in *Manusmṛti* and *Yājñavalkyasmṛti* the four methods of punishments as under:

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वाग्दण्डं प्रथमं कुर्याद्धिग्दण्डं तदनन्तरम्।
तृतीयं धर्मदण्डं तु वधदण्डमतः परम्।।

ज्ञात्वापराधं देशं च कालं बलमथपि वा।
वयः कर्मः च वित्तं च दण्डं दण्ड्येषु पातयेत्।। [21]

vāgdaṇḍaṃ prathamaṃ kuryāddhigdaṇḍaṃ tadanantaram।
tṛtīyaṃ dharmadaṇḍaṃ tu vadhadaṇḍamataḥ param।।

jñātvāparādhaṃ deśaṃ ca kālaṃ balamathapi vā।
vayaḥ karmaḥ ca vittaṃ ca daṇḍaṃ daṇḍyeṣu pātayet।।[21]

For the first time a guilty should be chided then second time reprimanded, for the third time monetary fine and finally the physical punishment to be inflicted. After fully considering the time the place of an offence, the strength and the knowledge of the offender, a just punishment has to be inflicted on those who act unjustly." [21]

According to Manu that:

if a Sudra knowingly commits a theft, he should be fined 8 times, worth of the stolen article; a Vaisya 16 times a Kṣatriya 32 times and a *brāhmaṇa* 64 times or 100 times or even 128 times.[22]

अष्टापाद्यं तु शूद्रस्य स्तेये भवति किल्बिषम्।
षोडशैव तु वैश्यस्य द्वात्रिंशत्क्षत्रियस्य च।।

ब्राह्मण्स्य चतुःषष्टिः पूर्णं वाअपि शतं भवेत्।
द्विगुणा वा चतुःषष्टिस्तद्दोषगुणविद्धि सः।। [22]

aṣṭāpādyaṃ tu śūdrasya steye bhavati kilbiṣam।
ṣoḍaśaiva tu vaiśyasya dvātriṃśatkṣatriyasya ca।।

brāhmaṇsya catuḥṣaṣṭiḥ pūrṇaṃ vāapi śataṃ bhavet।
dviguṇā vā catuḥṣaṣṭistaddoṣaguṇaviddhi saḥ।। [22]

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It indicates that the person from higher status deserves more severe punishment when compared to an accused from a lower status. The same concept is followed now also which conforms to the principles of natural justice.

In *smṛticandrika* also it is stated that this as a general rule for all offences.[23]

येन दोषणं शूद्रस्य दण्डो भवति धर्मतः।
तेन चेत्क्षत्रविप्राणं द्विगुणो द्विगुणो भवेत्। [23]

yena doṣaṇaṃ śūdrasya daṇḍo bhavati dharmataḥ।
tena cetkṣatraviprāṇaṃ dviguṇo dviguṇo bhavet।[23]

The concept of imposing punishment, causing pain, mental or physical is based on two main factors one is to create a sense of repentance leading to the reformation of the offender and the other is to ensure that it is proportionate to the gravity of the offence committed besides causing deterrent effect on others.

Manusmṛti says that:

If the King himself commits a crime, his punishment should be one thousand times more than a common man.[24]

कार्षापणं भवेद्दण्ड्यो यत्रान्यः प्राकृतो जनः।
तत्र राजा भवेद्दण्ड्यः सहस्रमिति धारणा।।[24]

kārṣāpaṇaṃ bhaveddaṇḍyo yatrānyaḥ prākṛto janaḥ।
tatra rājā bhaveddaṇḍyaḥ sahasramiti dhāraṇā।।[24]

The spirit of it indicates that King is not above the law. Probably the *sabhā* or parishad to which he is accountable may decide in the matter. The rule provided for the imposition of greater penalty on the King if he committed an offence when compared to that of other people. It is not clear as to who could impose that penalty. It is mentioned that he always tries to be in the good looks of the *sabhā*.

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It is also stated that the majority view of *sabhā* cannot be ignored by him. Probably the *sabhā* may decide in the matter. But the spirit or implication of the rule is that it unequivocally declares that the King is not above law. In this context it may be observed that the maxim "Rex non potest peccare" (the King can do no wrong) was not recognized in the Hindu legal system.

Manu also observes that:

The guilty should be punished only after fully considering the magnitude of his crime, the place and time of crime, the physical and monetary condition of the guilty and the nature of the crime committed. If a king punishes innocent persons and lets the guilty go scot-free; he is subjected to defame in the world and hell after death.[25]

अनुबन्धं परिज्ञाय देशकालौ च तत्त्वतः।
सारापराधौ चालोक्य दणडं दण्ड्येषु पातयेत्।।

अदण्ड्यान्दण्डयन्राजा दण्ड्यां श्चैवाप्यदण्डयन्।
अयशो महदाप्नोति नरकं चैव गच्छति।। [25]

anubandhaṃ parijñāya deśakālau ca tattvataḥ।
sārāparādhau cālokya daṇaḍaṃ daṇḍyeṣu pātayet।।

adaṇḍyāndaṇḍayanrājā daṇḍyāṃ ścaivāpyadaṇḍayan।
ayaśo mahadāpnoti narakaṃ caiva gacchati।। [25]

It is the exclusive prerogative of the King to decide the quantum of punishment. Nobody is supposed to influence him in this regard. The concept of providing complete independence strictly to the punishing authority is greatest contribution of ancient judicial system of Bhārat. There may be some suggestions and advices from the related sections of legal procedures but he is under no obligation to follow them literally in his decision as far as the imposition of the punishment is concerned. The concept that the 'Disciplinery authority should not be influenced by anybody', is

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incorporated in the service rules of officers working in Government and other public sector undertakings.

In this connection the court scene depicted in Sūdraka's drama, *Mṛchchakaṭikam* mirrors the social conditions and the exclusive privilege of the King in deciding and imposing the punishment. In that scene the judge says:

'We have authority only to pronounce the judgment; as to the rest the King is the final authority'.[26]

अधिकरणिकः -----आर्य चारुदत्त निर्णये वयं प्रमाणं। शेषे तु राजा। [26]

adhikaraṇikaḥ ārya cārudatta nirṇaye vayaṃ pramāṇaṃ। śeṣe tu rājā। [26]

The case of Charudatta in the *Mrichchhakatika* would further show that the jurors used to give their opinion about the innocence or guilt of the accused; the quantum of punishment was often left to the King. According to Kautilya:

If the judge or the magistrate imposes a money fine on one not deserving to be fined, he shall impose on him double the fine imposed, or eight times the shortfall or excess (over the prescribed fine). If he imposes corporal punishment (wrongly), he shall himself suffer corporal punishment or pay double the (normal) redemption-amount. Or, he shall pay a fine eight times the just claim which he disallows or unjust claim which he allows.[27]

धर्मस्थः प्रदेष्टा वा हैरण्यदण्ड्ये क्षिपति क्षेपद्विगुणमस्मै दण्डं कुर्यात्, हीनातिरिक्ताष्टगुणं वा। (शरीरदण्डं क्षिपति शरीरमेव दण्डं भजेत ,निष्क्रयद्विगुणं वा।) यं वा भूतमर्थं नाशयति अभूतमर्थं करोति तदष्टगुणं दण्डं दद्यात्।[27]

dharmasthaḥ pradeṣṭā vā hairaṇyadaṇḍye kṣipati kṣepadviguṇamasmai daṇḍaṃ kuryāt, hīnātiriktāṣṭaguṇaṃ vā। (śarīradaṇḍaṃ kṣipati śarīrameva daṇḍaṃ bhajeta, niṣkrayadviguṇaṃ vā।)

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yaṃ vā bhūtamarthaṃ nāśayati abhūtamarthaṃ karoti tadaṣṭaguṇaṃ daṇḍaṃ dadyāt।[27]

The daṇḍā, however, must be wielded with discretion. If it is used too harshly, the subjects are distressed; if it is used too lightly, the King will not be held in awe; if it is used in the proper manner, the subjects are happy and the realm progresses. [28]

तीक्षणदण्डो हि भूतानामुद्वेजनीयः।
मृदुदण्डः परिभूयते। यथार्हदण्डः पूज्यः।[28]

tīkṣaṇadaṇḍo hi bhūtānāmudvejanīyaḥ। mṛdudaṇḍaḥ paribhūyate। yathārhadaṇḍaḥ pūjyaḥ। [28]

This parallel shows that the source for such ideas of equity and the concept of proportionate punishment is from the traditions of ancient India and not from other countries as observed in the digests which came subsequently.

The concept of imposing punishment, causing pain, mental or physical is based on two main factors one is to create a sense of repentance leading to the reformation of the offender and the other is to cause a deterrent effect on others besides ensuring that it is proportionate to the gravity of the offence committed.

The uniform rule prescribed in all the smṛtis goes to show that in respect of offences, after it was properly recorded by the court, the question of deciding the quantum of penalty solely vested in the King. The quantum of penalty was required to be decided by him independently taking into account not only the charge proved but all other circumstances which were prescribed as relevant for deciding the same. The importance of this procedure stands recognized under the Criminal Procedure Code, 1973, which requires separate hearing about quantum of penalty.

The above provisions required the King to be highly circumspect and judicious in the matter of imposition of penalties. In the first instance, he was to be satisfied beyond any reasonable

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doubt, about the guilt of the accused. Even when the accused was found guilty, in deciding the quantum, the King was required to take into account the age, the physical condition and health of the accused, his capacity to bear the penalty as also any aggravating or extenuating circumstances such as provocation etc., if any, as also his past record. The King was required to be kind to first offenders. Thus the entire social well-being is thus dependent upon it.

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Chapter - V
Sources of Hindu Law

Primary Source

It is desirable to examine the sources of Law in Ancient Bhārat from the writings of the original authorities. The term 'source of law', in its legal sense, means that which is recognized and form the very genesis for the formation of the principle of law. In ancient legal literature five principal sources of law were identified. They are śruti, smṛti, sila, svasya priyam and sadācāra. In addition to these, subsequently, the commentaries, judicial precedents and legislation have played a great role as sources of Hindu Law.

śruti: In Jaimini's *Pūrvamīmāmsa* it is stated that:

The Vedic Injunction is the only trustworthy source of our knowledge of dharma i.e., of what is right, what is conducive to good, temporal and spiritual and declared that these are to be relied upon only so far as they are not repugnant to anything declared in the Veda.[1]

चोदन लक्षणो अर्थो धर्मः॥[1]

codana lakṣaṇo artho dharmaḥ॥[1]

The śruti literally means what is heard by or revealed to the earliest sages. Though the four Vedās, the six Vedāṃgās and the eighteen Upaniṣads are included within the śrutis, they contain

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only indirect references to the statements which are regarded as authoritative expositions of law. The śrutis are the earliest and one of the most important ancient sources of Hindu law. With regard to juristic matters it may be difficult to readily trace in Vedās but they can be inferred from indirect references in various contexts. For example *Taittirīopaniṣad* says that:

Tell the truth, Never tell untruth, Follow Dharma, Never hurt anyone, Treat your mother and father as God, Perform only such acts which are not forbidden. [2]

सत्यं वद। नानृतं वदेत्। न हिंसयेत्। धर्मं चर। मातृदेवो भव। पितृदेवो भव। यान्यानवद्यानि कर्माणि तानि सेवितव्यानि नो इतराणि।। [2]

satyaṃ vada। nānṛtaṃ vadet। na hiṃsayet। dharmaṃ cara। mātṛdevo bhava। pitṛdevo bhava। yānyānavadyāni karmāṇi tāni sevitavyāni no itarāṇi।। [2]

There are several Do's and Don'ts. These ingredients form the essence of rule of law for maintaining proper conduct in the society. Based on these principles laws were constructed in Dharmasūtrās and Dharmaśāstrās (smṛtis.) It is not advisable to formulate any law contrary to these principles. Any legal provision against these principles is treated as void. It means that these directions constitute the very essence of any law. Hence it is conclusively accepted that the Veda is the primary source of law. There is no doubt that the most important source to Hindu law is the smṛtis. These smṛtis are based on the śrutis; the commentaries and the nibandhās again are based upon the smṛtis. Hence, it can safely be said that the śrutis are the primary source of law. Gautama says as mentioned in *The Sacred Books of The East* that:

The Veda is the source of dharma, also the smṛti, and 'Sila' of those learned in the Veda'. Custom of cultured man is included. The administration of justice shall be regulated by Veda, the institutes of the sacred law, the vedāṃgās and the Purana.[3]

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Baudhāyana observed that:

a) Veda, (b) the smṛti, and (2) 'Sistāgama , 'are the sources of dharma. The 'Āgama , ' teaching, of the 'sistas, ' (शिष्टः) 'cultured men i.e., 'those who are free from ill-feeling, devoid of vanity, possessed of sufficient grain, not greedy, devoid of hypocrisy, haughtiness, avarice, stupidity and anger- those who have studied, in the right manner, the Veda along with its supplements and are well versed in making deductions out of them.' (Agreeing the same Apastamba observed that) the 'convention or opinion of those versed in dharma' and 'also the Veda, ' are the authority.[4]

Vāśiṣṭa says that:

The sacred law has been settled by the revealed text (Veda) and by the tradition (smṛti) of sages. In the event of the aforesaid, śruti and smṛti not being available, the practice of cultured men is the authority. the 'cultured man' being defined as one who is selfless, having no desires of his own.[5]

It is observed in *Manusmṛti* that:

Whatever duty for whosoever has been prescribed in Manu smṛti is all said in the Veda as Manu is authority in Vedic knowledge. Vedās should be known to be śrutis and Dharmaśāstrā to be Smṛtis. They are beyond the range of criticism. Dharma manifested from them. All Vedās, the Smṛtis of well versed Vedic scholars and their good conduct, the norms followed by the noble and finally self-satisfaction are the roots of dharma. Sista brāhmaṇas are those who have studied Vedās with their limbs viz., Vedāṃgās religious mindedly and only they are the source of making the real meanings of Veda understandable. Vedās, Smṛtis, noble conduct and self-appealing; these four are called the deciding factors of Dharma.[6]

यः कश्चित्कस्यचिद्धर्मो मनुना परिकीर्तितः।
सः सर्वो अभिहितो वेदे सर्वज्ञानमयोहि सः।।

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श्रुतिस्तु वेदो विज्ञेयो धर्मशास्त्रं तु वै स्मृतिः।
ते सर्वार्थेष्वमीमांस्ये ताभ्यां धर्मो हि निर्बभौ।।

वेदो अखिलो धर्ममूलं स्मृतिशीले च तद्विदाम् ।
आचारश्चौव साधूनामात्मनस्तुष्टिरेव च।।

धर्मेणाधिगतो यैस्तु वेदः सपरिवृंहणः।
ते शिष्टा ब्राह्मणा ज्ञेयाः श्रुतिप्रत्यक्षहेतवः।।

वेदः स्मृतिः सदाचारः स्वस्य च प्रियमात्मनः।
एतच्चतुर्विधं प्राहुः साक्षाध्दर्मस्य लक्षणम् ।।[6]

yaḥ kaścitkasyaciddharmo manunā parikīrtitaḥ।
saḥ sarvo abhihito vede sarvajñānamayohi saḥ।।

śrutistu vedo vijñeyo dharmaśāstraṃ tu vai smṛtiḥ।
te sarvārtheṣvamīmāṃsye tābhyāṃ dharmo hi nirbabhau।।

vedo akhilo dharmamūlaṃ smṛtiśīle ca tadvidām ।
ācāraścauva sādhūnāmātmanastuṣṭireva ca।।

dharmeṇādhigato yaistu vedaḥ saparivṛṃhaṇaḥ।
te śiṣṭā brāhmaṇā jñeyāḥ śrutipratyakṣahetavaḥ।।

vedaḥ smṛtiḥ sadācāraḥ svasya ca priyamātmanaḥ।
etaccaturvidhaṃ prāhuḥ sākṣādhdarmasya lakṣaṇam ।।[6]

This is further improved upon by Yājñavalkya, that:

The Veda, the Smṛti, practices of the good and their way, what is agreeable to one's conscience and the proceeding from good intention, are the sources of law. [7]

श्रुतिः स्मृतिः सदाचारः स्वस्य च प्रियमात्मनः।
सम्यक्संकल्पजः कामो धर्ममूलमिदं स्मृतम् ।। [7]

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śrutiḥ smṛtiḥ sadācaraḥ svasya ca priyamātmanaḥ।
samyaksaṃkalpajaḥ kāmo dharmamūlamidaṃ
smṛtam ।।[7]

Manu's observation read with that of Yagnavalkya, Gautama and Bṛhaspati indicates that the Smṛti writers were fully conscious to the changing needs of the society. Therefore they specifically made sadācāra i.e., good custom or practice agreeable to the conscience of the people, who are well intentioned and who have regard for the welfare of society, as a source of law. The expression sadācāra was defined by Harita as referred to in the *History of Dharmaśāstra* that:

The word 'sat' means good, and the good are those who are pure and free from stigma, and the practice of such people is called sadācāra.[8]

साधवः क्षीणदोषाः स्युः सच्छन्दः साधुवाचकः।
तेषामाचरणं यत्तु स सदाचार उच्यते।। [8]

sādhavaḥ kṣīṇadoṣāḥ syuḥ sacchandaḥ sādhuvācakaḥ।
teṣāmācaraṇaṃ yattu sa sadācāra ucyate।।[8]

In *Smṛticandrika* it is stated that:

The Veda is authoritative as it is independent of human authorship. It may be observed that śruti operates in the following six forms: 1) The Mandatory text; 2) the Prohibitive text; 3) the narrative text of two kinds, the commendatory and the condemnatory; the former serves the purpose of delineating the excellence of the course of action enjoined by the Mandatory text; the condemnatory text serves to deprecate the course of action prohibited; 4) the proper names of particular sacrifices help in the determining of the exact action connoted by the common root 'yaji' 'to sacrifice', occurring in the mandatory text; 5) the meaningless syllables, stobhas, introduced in the Samachant, serve the purpose of marking time and cadence and

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6) the Upanisad text serves to promulgate that knowledge of Brahman which destroys all evil.[9]

Parāśarasmṛti says that:

At the beginning of each Kalpa, there appear Brahma, Visnu and Siva and also the propounders of (1) śruti, 2) smṛti and (3)sadācāra.[10]

कल्पे कल्पे क्षयोत्पत्तौ ब्रह्मविष्णुमहेश्वराः।
श्रुतिस्मृतिसदाचारनिर्णेतारश्च सर्वदा।। [10]

kalpe kalpe kṣayotpattau brahmaviṣṇumaheśvarāḥ।
śrutismṛtisadācāranirṇetāraśca sarvadā।। [10]

The Smṛtis: The term smṛti literally means what is remembered. The authors of these smṛtis do not claim any revelation; they compiled only what they remembered of the revelations to the earliest sages on account of their intimate knowledge and actual observance. Revelation is thus supposed to be the basis of the smṛtis as they are remembered and compiled by those who believed the Vedās to be the only source of law and because they were accepted and actually acted upon as authoritative. The smṛtis and Dharmasūtrās stand on the same footing. Dharmasūtrās precede Smṛtis. The legal doctrines enunciated in the Dharmasūtrās were later elaborated and versified in smṛtis.

The Dharmaśāstrās (smṛtis) are the real sources of Hindu law as it is operative today. There are many authors of Dharmaśāstrās among whom, Manu, Yājñavalkya, Parāśara Vyāsa, Bṛhaspati, Kātyāyana and Nārada are the most well-known and authoritative. Among them again Manu is supposed to be the highest authority, as it has been admitted by the Smṛtis themselves that no smṛti can have any authority if it militates against the smṛti of Manu. It is observed by many scholars that Manu and Yājñavalkya practically represent the golden age of the Hindu legal history and Nārada and Bṛhaspati indicate the latest epoch in its developments. In

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between the Dharmasūtras and Dharmaśāstrās is the *Arthaśāstra* of Kautilya which also occupies a very important place in the history of Hindu law.

As in the case of the authors of the Dharmasūtrās, nothing is known definitely about the personal history of the authors of the Dharmaśāstrās P.V. Kane says that:

The most famous author of the Dharmaśāstrā *namely, Manu is supposed to have flourished between 200 B.C and 100 A.D. Yājñavalkya is supposed to have lived and written his work in between 1st and 3rd century A.D. The latest and one of the most authoritative writers of the Dharmaśāstrā was Nārada who is usually believed to have belonged to a period 1st to 4th century A.D.*[11]

Besides these the purāṇās and the Epics also are sometimes treated as sources of Hindu law. But references to them have been very few. The purāṇās are included in the smṛtis in their widest sense. The purāṇās were enumerated as source of law even byYājñavalkya though Mitra Misra in his commentary on *yajñyavalkyasmṛti* says that they are not so.

Sila: Medhatithi as mentioned in *Studies of Hindu Law* commetnting on *Mansmṛti,* II-.6: *(All Vedās, the smṛtis of well versed Vedic scholars and their good conducts, the norms followed by the noble and finally self satisfaction-are the root of Dharma) says that:*

"Smṛti is Recollection and 'Sila' denotes freedom from love, hatred and such improper feelings." It is observed that the trustworthiness of a writer of smṛti should be threefold: (1) he must be learned ('tadvidam), (2) he must be 'conscientious', 'free from love and hatred' (Sila), and (3) he must be 'righteous' (Sadhunam), be habitually engaged in carrying out the injunctions of the Veda. Only the works authored by such persons should be taken as having same authorities as those of smṛtis. So that even at the present day if there

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were such a person and he were to compose a work, then for all later generations that work would be regarded just as highly as those of Manu and others. This is the reason why Medhatithi is averse to the practice of enumerating the authoritative smṛtis."[12]

Here *Kaundinya smṛti* authored by Mahamahopadhyaya Prof. P. śrīrāmacandruḍu can be referred to as one such great smṛti of recent times. With an erudite scholarship in the ancient smṛtis, the darśanās, the various systems of Philosophy and, of course, the vast Sanskrit literature he has dealt the basic principles of sanātana dharma. According to him "sanātana dharma is a dharma with tremendous potentialities, with an open heart which can embrace any one and with an open mind which can receive every noble thought from any quarter and this spirit is to be re kindled. In the foreword to this smṛti, written by Sadguru śrī śivānandamūrti gāru it is observed that:

The strange but actual truth about this vast culture is that all regions of India have digested and absorbed the basic fundamental principles of morals, individual or social, the general outline of religious observances and an unshakable belief in after life and the ultimate goal of emancipation of the individual soul. This is referred to as "sanātana dharma" *that embraced all sections of society with equal application. This sanātana Dharma ruled and regulated the conduct of everyone, from the king to the farmer, even as far as back as the times of rāmāyaṇa. Sri Rama or Sri Krishna, great kings, or learned brāhmins are all honoured and even worshipped by us even today not for any personal reasons, but because they had lived strictly in accordance with principles of this sanātana dharma through all vicissitudes of life. This Dharma in its essence is very much alive today sans the meticulous ritualism attendant to it."*[13]

Kulluka commenting on Manu (II-6) as mentioned in *vīramitrodayaparibhāṣa-* says:

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The smṛti of 'persons learned in the Veda is authoritative—this last qualification being added for the purpose of indicating that the authority of smṛti is due to its having its source in the Veda. The knowledge of Veda implies also the knowledge of certain other branches of study, which is essential to the proper understanding of the Veda. These have been thus enumerated by Yājñavalkya viz, 'there are fourteen departments of knowledge and of dharma; the four (1-4) Vedās along with (5) purāṇās, (6) nyāya, (7) Mīmānsa, (8) Dharmaśāstrā(9-14) the six 'Limbs' or 'subsidiary sciences of Veda.'[14]

It is mentioned in *Smṛticandrika*, that:

'Purana'—the Brahma and the rest; 'Nyaya', Reasoning; 'Mīmānsa, *discussion relating to the exact meaning of Vedic passages; 'Dharmaśāstrā', the* Smṛtis *of Manu and others; and the four Vedās with the six 'subsidiary sciences' are the 'means' of knowing dharma, and also of dharma itself, through that knowledge.*[15]

In the absence of any direction from 'Śruti' or 'Smrti' text one should be guided by the 'Pariṣad' viz., Assembly. In *Manusmṛti* and also *yajñyavalkyasmṛti* it is stated that:

In a situation where no clear reference or injunctions are given in the Śāstrās, What should a man do? In such a situation one should consult and follow the advice of a brāhmaṇa reliably well read and a man of character (Sista). (Yājñavalkya *says that) Such* ('pariṣad') *Assembly should consist either of (1) four men versed in the Veda and the Dharmaśāstrā or of (2) those men each versed in three Vedās, or of (3) only one man who is the best 'knower of the philosophy of the Self and their advice is to be followed'*[16]

अनाम्नातेषु धर्मेषु कथं शयादिति चेद् भवेत्।
यं शिष्टा ब्राह्मणा ब्रूयुः स धर्मः स्यादशङ्कितः।

चत्वारो वेदधर्मज्ञाः पर्षत् त्रैविद्यमेव वा। सा ब्रूते यं स धर्मः
स्यादेको वाध्यात्मवित्तमः।। [16]

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anāmnāteṣu dharmeṣu kathaṃ śayāditi ced bhavet।
yaṃ śiṣṭā brāhmaṇā brūyuḥ sa dharmaḥ syādaśaṅnkitaḥ।
catvāro vedadharmajñāḥ parṣat traividyameva vā।
sā brūte yaṃ sa dharmaḥ syādeko
vādhyātmavittamaḥ।।[16]

Manu also states that:

In a critical situation an assembly of ten 'Sista brāhmaṇas should be appointed and if it is not possible only three such brāhmaṇas should be approached and whatever decision it makes should be accepted scrupulously with no doubt in the mind. The (pariṣad) Assembly of three Sista brāhmaṇas should consist of three experts in Rk, Yaujh, and Sama respectively. Its decision in doubtable religious matters may be final.[17]

दशवरा वा परिषद्यं धर्मं परिकल्पयेत्।
त्र्यवरा वापि वृत्तस्था तं धर्मं न विचालयेत्।।

ऋग्वेदविद्यजुर्विच्च सामवेदविदेव च।
त्र्यवरा परिषज्ज्ञेया धर्मसंशयनिर्णये।। [17]

daśavarā vā pariṣadyaṃ dharmaṃ parikalpayet।
tryavarā vāpi vṛttasthā taṃ dharmaṃ na vicālayet।।

ṛgvedavidyajurvicca sāmavedavideva ca।
tryavarā pariṣajñjñeyā dharmasaṃśayanirṇaye।।[17]

Medhatithi as mentioned in *Studies of Hindu Law* comments that:

The two terms 'śilā' and 'śruti' "as inter-related—the two together standing for 'conscientious recollection', so that according to him śilā is not a distinct means of knowing dharma. He also suggests another explanation of śilā by which it pertains to all acts;

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the meaning that whatever one does with the mind free from all 'love and hate'[18].

According to Yājñavalkya 'Samyaksankalpajahkamah' is determination or judgment after full reflection. (*Yājñavalkyasmṛti*.1-7) *vīra***amitrodaya** commenting on Yājñavalkya as mentioned in *Studies of Hindu Law* says that:

"samyaksankalpa is such volition as is free from love, hatred and such aberrations— kāma, well considered vow. Or this may be the same as what Manu has called śilā, which has been described in the Mahābhārat—as consisting in knowledge and sympathy, in thought, word and act, towards all living beings—this is called 'a source of dharma' in the sense that it is helpful in the man possessed of this quality being better able to understand what is said in the Veda".[19]

Atmanah tushtihi- Svasya Priyam: Medhatithi as mentioned in *Studies in Hindu Law* on Manu II.6, states that:

This 'self-satisfaction' is meant to be of those only who are 'learned in the Veda and good', vedavidam sadhunam; it means that this is the 'source of dharma'. It is based upon the trustworthy character of the persons concerned. When the 'learned and good' feel satisfied about the righteousness of a certain action, that action must be accepted as right; because, such men can never feel satisfied with anything that is short of right". vīramitrodaya on Yājñavalkya 1.7 observes that 'Svasya priyam' means 'self-satisfaction'; i.e., the satisfaction regarding the propriety of a certain act, in the mind of such men as are steeped in Vedic tradition. In Smritcandrika it is stated that this is authority only in determining one of several optional alternatives.[20]

Sadācāra (Customs and Usages): In all the systems of law, more or less customs have been recognized as one of the most important sources of law. The Historical school of jurisprudence takes customs as the true type of law. This is a general theory regarding the origin of custom and law. Thus it can be said that customs played and are

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still playing a very important role in all systems of law-ancient and modern. Hindu law was not an exception. In Hindu law custom was one of the most important and fruitful sources of law according to Manu. (MS, II, 12.) The efficiency of customs and usages was most emphatically and unequivocally recognized by the smṛti-writers and the commentaries on Hindu Law. The custom is sometimes superior to the law provided the essential conditions are fulfilled. These conditions are mainly antiquity and consonance with public morality.

There is no doubt that customs acquire their strength on account of unmistakable acceptance and continued observance. As a matter of fact, antiquity itself is the most inherent recommendation for the acceptance and recognition of customs, in as much as, these customs have successfully stood the test of time and have been found useful and convenient to the society concerned. The nature, scope and development of customs and usages have been briefly but inimitably explained by Mayne in his treatise *'Hindu Law and Usage'* as under:

The beginnings of law were in custom. Law and usage act and react upon each other. A belief in the propriety or in the imperative nature of a particular course of conduct produces a uniformity of behavior in following it and a uniformity of behavior in following a particular course of conduct produces a belief that is imperative or proper to do so. When from either cause or from both causes, a uniform, persistent usage has moulded the life and regulated the dealings of a particular class of the community, it becomes a custom which is a part of their personal law" [21]

Customs were either supplements or supplant the law. Thus *Manusmṛti* says that all cases should be decided by the Śāstrās and the usages and that it is also the duty of the King to enquire into the laws of castes, districts, guilds and families. *Gautama Dharmasūtrās* also say that:

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The customs of countries, castes and families which are not opposed to the sacred laws have also authority. Cultivators, traders, herdsmen, money-lenders, and aritisans have authority to lay down rules for their respective classes.[22]

तस्य च व्यवहारो वेदो धर्मशास्त्राण्यङ्गान्युपवेदाः पुराणम्।
देशजातिकुलधर्माश्चाम्नायैरविरुद्धाः प्रमाणम्।। [22]

tasya ca vyavahāro vedo
dharmaśāstrāṇyaṅgānyupavedāḥ purāṇam।
deśajātikuladharmāścāmnāyairaviruddhāḥ
pramāṇam।। [22]

Manu also says that:

In that country whatever social norms for four casts and mixed ones traditionally prevailed, is called noble conduct (sadācāraḥ) for those particular societies.[23]

तस्मिन्देशे य आचारः पारंपर्यक्रमागतः।
वर्णानां सान्तरालानां स सदाचार उच्यते।।[23]

tasmindeśe ya ācāraḥ pāraṃparyakramāgataḥ।
varṇānāṃ sāntarālānāṃ sa sadācāra ucyate।।[23]

The above definitions clarify that every custom could not acquire the force of law. The custom or usage, in order to secure social recognition, must be acceptable to honest and reasonable persons, whose character and conduct is beyond reasonable doubt. This appears to be a residuary provision which, in fact, had taken care of the possible future requirements. This has also provided for matters not covered by the Shruti and Smṛtis. This provision was fully utilized by the great galaxy of jurist commentators, to adapt the law to suit the needs of the changed circumstances.

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The essential conditions of a valid custom: To be valid a custom it must be ancient, continuous, established by clear and unambiguous evidence, reasonable and not against morality or public policy. Antiquity is the most important condition of a valid custom. As a matter of fact it is this antiquity which supplies the sanction for a custom. With regard to continuity it is observed that a discontinuance of a custom for a period means that it has come to an end whatever may be the cause of the discontinuation. In relation to clear proof it is said that every custom in derogation of the general Hindu law must be strictly proved by clear and unambiguous evidence by the person who alleges such a custom. With regard to its moral nature it is observed in a judgement that:

No custom will be regarded as valid if it is unreasonable or against morality or public policy, or against the express provision of any Act of legislature.[24]

Registration of conventions under Royal Seal: So far as Shruti and Smṛti were concerned they were specific and therefore the provisions contained therein were always known and ascertainable. The conventions or trade usage formed another source of law. In order to make them known to the public, specific provision was made in the Smṛtis for the registration of such provisions under the royal Seal. According to Kātyāyana *Smṛti* as mentioned in the *Legal and Constitutional History of India* that:

Whatever conventions are settled in accordance with the consent of the people of a country should always be preserved in writing with the Royal Seal. Such conventions should be enforced just like the sacred law and the King should decide after considering them. Whatever trade conventions are reduced to writing by traders as fit to be carried out; these must be given effect to and the King should not lay down anything contrary to them.[25]

देशस्यानुमतेनैव व्यवस्था निरूपिता।
लिखिता तु सदा धार्या मुद्रिता राजमुद्रया।।

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तस्मात् तत्संप्रवर्तेत नान्यथैव प्रवर्तयेत्।
प्रमाणदेशदृष्टं तु यदेवमिति निश्चितम्।। [25]

deśasyānumatenaiva vyavasthā nirūpitā।
likhitā tu sadā dhāryā mudritā rājamudrayā।।

tasmāt tatsaṃpravarteta nānyathaiv pravartayet।
pramāṇadeśadṛṣṭaṃ tu yadevamiti niścitam।। [25]

The above provision also reinforces the idea that it was for the people to evolve the law even in respect of fields uncovered by the śruti or smṛtis and that the duty of the king was only to register and enforce the law accepted by the people, against individuals who contravened them.

Superiority interse between the sources of law: It is desirable to examine the basic principles enunciated to determine as to which one ranks first as against the other. Manu observes that:

Where two śruti texts are mutually contradictory, both should be taken as authentic, i.e., the two courses laid down are to be treated as optional alternatives.[26]

श्रुतिद्वैधं तु यत्र स्यात् तत्र धर्मावुभौ स्मृतौ।[26]

śrutidvaidhaṃ tu yatra syāt tatra
dharmāvubhau smṛtau।[26]

Gouthama also says that:

When there is conflict between two smṛtis, they should be treated as optional alternatives.[27]

"तुल्यबलविरोधे विकल्पः"[27]

"tulyabalavirodhe vikalpaḥ"[27]

According to Vyāsa as mentioned in the *Legal and Constitutional History of Inida* that:

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Whenever there is conflict between Shruti (Veda), Smṛtis and purāṇās; then what is stated in the Shruti should be taken as authority.[28]

श्रुतिस्मृतिपुराणानां विरोधो यत्र दृश्यते।
तत्र श्रौतं प्रमाणन्तु तयोर्द्वैधे स्मृतिर्त्वरा।। [28]

śrutismṛtipurāṇānāṃ virodho yatra dṛśyate।
tatra śrautaṃ pramāṇantu tayordvaidhe smṛtirtvarā।। [28]

In this regard *Yājñavalkyasmṛti* says that:

Where two Smṛtis come into conflict, principles of equity, as determined by popular usages (logical) shall prevail.[29]

स्मृत्योर्विरोधे न्यायस्तु बलवान् व्यवहारतः। [29]

smṛtyorvirodhe nyāyastu balavān vyavahārataḥ। [29]

It may be observed here that the above rule indicates, even in the case of conflict between two Smṛtis, the King was not given any power or discretion to make a choice but he was required to apply the law as approved by custom and usage followed by the people themselves. Keeping these sources of law in view King has to take decisions according to the rules of sacred law. When it is impossible to act up to the precept of sacred law, it becomes necessary to adopt a method founded on reasoning because custom decides everything and over-rules the sacred law.

Legislation: Legislation also is a very important source especially of modern Hindu law. The ancient Hindu law, based as it was on the smṛtis, was original, complete and comprehensive. It was subsequently elaborated, explained and commented upon by the commentators and the Nibandhakaras. At the earliest stage, Hindu law was dynamic and accommodating enough to meet the needs of the growing and expanding society. But Subsequently

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owing to the adverse atmosphere of foreign rule its growth became tardy. Legislation was steadily responsible for the systematic development of Hindu Law particularly from the later part of the 19th century.

Adjudication: Strictly speaking, adjudication by the courts is not an independent source of law, in as much as, the courts are supposed to apply and interpret the existing law. But the fact remains that even the courts sometimes make new law in course of this interpretation and application. If legislation played an important part in the development of Hindu law a still more important part was played by the decided cases in the reorientation thereof. The effect of legislation was direct, but that of adjudication was indirect, under the guise of interpretation.

Legal Texts: From 7th century on wards smṛti literature virtually stopped growing. After a gap of two to three centuries the period of legal texts known as commentaries and digest started appearing. Interpretation played a very important part in the development of Hindu law through the commentators. There are so many important commentaries on Hindu law which gave rise to so many schools and sub-schools. These legal texts played a great role in developing the law and created a smooth path for application of smṛti laws to the contemporary society keeping in view the changes that take place as time passes. These commentaries are still contributing a lot to the development of the Hindu law so far as its actual application is concerned the details of which are discussed in the next chapter.

End Notes

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Chapter - VI

Development of Hindu Law through legal texts

Background:

Manu smṛti is the first to take sutra literature as primary source in addition to gathering various customs and traditions and moulding them into legal concepts. Though it dealt with many issues relating to substantial and procedural aspects of law, they were not properly separated from the issues relating to only moral and religion. Yājñavalkya in his smṛti could separate the smṛti literature obtaining at that time into ācāraḥ, vyavahāra and prāyaścittta. Thereafter, Nārada, Bṛhaspati and Kātyāyana dealt almost exclusively the legal procedure comprehensively.

It is an established fact that the law and society are most inextricably connected with each other. Thus law is a social concomitant. This close relation again is primarily responsible for the corresponding changes in law whenever changes take place in the society. As far as west is concerned, the sociological method of studying law and jurisprudence is of recent origin. Whereas this aspect was well recognized in Ancient Bhārat and the fact that its growth depends on the progressive changes that take place in the society was well appreciated. The smṛtis naturally covered almost all the branches of law which the society then needed. Smṛti

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literature virtually stopped from seventh century on wards. As time passes many changes took place resulting in difficulty to apply the smṛti concepts to the developing society. Bhārat coming under alien rule also contributed much in this regard. Thus the society was confronted with several problems in connection with the application of the law as contained in the smṛtis.

Some of the important problems appeared to be that on certain issues the smṛtis contained conflicting provisions; certain provisions were ambiguous and on certain other matters, the smṛtis were silent. The language of the smṛtis was difficult in certain cases and required skilful interpretation. As far as procedural law is concerned many changes were required to meet the developing society. The aforesaid problems were ably and successfully met with by the works of eminent jurists or commentators with the aid of Mīmāmsa the rules of interpretation.

The *Pūrvamīmāṃsa* essentially a system aiming at an interpretation of doubtful sacrificial texts and an elucidation of obscure sacrificial details. Thus what was originally meant for providing clarifications to the doubts in understanding śruti, has later become a potential instrument for rational interpretation of other disciplines. And it is this later development of the *Pūrvamīmāṃsa* that is embodied in the sūtras of Jaimini. Though originally intended for sacrificial purposes, their doctrines were destined to be of great help in the field of Law, a field which was secular and dynamic in its nature. Thus the presence of Mimamsaka was considered essential in the assembly (pariṣad) of the scholars, a body which was supposed to look after the needed changes in the laws obtaining at that time.

Today when maters of more secular hold us under their sway, the system of the *Pūrvamīmāṃsa* has ceased to make any effective appeal on the society. But its potentiality lies in its interpretative faculty. "Particularly, one can never minimize the importance

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of mīmāṃsa methods in giving the final and definite form to the Hindu Law which, has been left to the mercy of the interpretative ability of the judge. It will be *Pūrvamīmāṃsa* that will emancipate Hindu Law from subjective interpretation and give it finality. As mentioned in '*Arthasangraha of L. Bhaskara*' Colebrooke says that:

"A well ordered arrangement of mīmāṃsa principles would constitute the philosophy of the law, and this is, in truth, what has been attempted in the mīmāṃsa." [1]

The next stage of development of law consisted of interpretation of the laws so laid down with necessary illustrations so as to ensure their proper application. This was carried out by the commentaries and digests authored by those who were well versed in Dharmaśāstrā Tarkaśāstrā and vyākaraṇa. These commentaries on law directly helped in the interpretation, development and practical application of law and the administration of justice. These commentaries and digests written by eminent jurists from time to time with necessary adaptations have fulfilled the requirements of a changing society.

The need of such commentaries and digests was felt for the following reasons. Firstly, interpretation was necessary to find out the meaning of difficult, ambiguous or conflicting provisions of the śruti and the Smṛtis. Secondly, there was no established record of decided cases to serve as law of precedents. Thirdly there was no any amending machinery to assimilate into the legal system the accepted positions in law either by interpretation placed by the court or by custom and the usage accepted by the society. The commentators fulfilled these requirements admirably. The resultant position was, while the Dharmaśāstrās remained the basic law, the commentaries can be said to have embodied the law as in force at the relevant time when the respective commentaries were written.

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By their extraordinary intellectual capability and the force of logic and expression, they removed the inconsistencies in the smṛti literature with the aid of accepted usages and customs, and gave them the required shape so as to fulfill the aspirations of the people during the relevant period. The commentaries and the digests can be called as legal texts. Broadly speaking, a commentary covers only a particular text while a digest or a Nibandha presents a general view on matters obtaining in various smṛtis authored at different times. But this is not a hard and fast rule. Some commentaries, such as the famous *Mitākṣarā*, treat various subjects as comprehensively as the digest.

The writers of these legal texts provide the needed details to fill up the gaps. They make some modifications to bring the rules in harmony with the usages. Some rules are totally rejected on the ground that they are not admissible in the Kali age. In these ways, the commentaries and digests brought about changes in the subject matter of smṛtis.

It is well known fact that the Hindu Law got divided into two branches - *Mitākṣarā* and the *Dāyabhāga. Mitākṣarā* system was propounded by vijñāneśvara and the *Dāyabhāga* system by Jimuthavahana. The *Mitākṣarā* prevailed over the whole of India except Bengal and Assam, while the *Dāyabhāga* prevailed in Bengal and Assam. These two schools basically differ in the matter of inheritance of property.

Mitākṣarā **school:** The title *Mitākṣarā*, which etymologically means 'limited letters', is given to the celebrated and outstanding commentary on the *Yājñavalkyasmṛti* by vijñāneśvara, the author of great fame, to indicate that it is a brief and precise commentary. It presents a refined and elaborate code. Its nature is more like a digest than a commentary. The commentary has stood the test of time, having been accepted as of paramount authority throughout this vast country and during all these centuries. Even at present, in

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respect of matters not altered by legislation, it continues to be the personal law applicable to the majority of Hindus and enforceable and being enforced in courts of law, as it constitutes the 'existing law' saved by Article 372 of the Constitution.

***Dāyabhāga* school:** Jimutavahana is one of the foremost commentators and founder writers of the Bengal School. Scholars put him between eleventh and fifteenth centruries. Jimutavahana has written a vast treatise "*Dharmaratna*". The whole work is divided into three parts: *kālaviveka, vyavahāra mātṛka,* and *Dāyabhāga.* In *kālaviveka,* the auspicious time for performing various rituals, festivals, sacraments, and worships of gods are elaborately described. *Vyavahāra mātṛka* deals with the eighteen titles of law, judges, courts of law, assessors, the plaint, and defendant, defects of a plaint, reply, and means of proof, document, possession, witnesses, oaths, and ordeals. The third part, the *Dāyabhāga,* is one of the most celebrated works of Indian jurisprudence. It has contributed a great deal on distribution of ancestral property, its ownership, and Stridhana. Jimutavahana strongly expounds the viewpoint rejected by *Mitākṣarā. Dāyabhāga* asserts that ownership does not arise by birth. Sons get right of ownership only after the ownership of the father ends by his death, or by his becoming an outcaste or ascetic. The division of property can take place among the father and sons, if the father wishes so. The widow inherits her husband's right even in joint property. The property right arises in a person only after offerings of the Pindas to the dead person are made.

The difference between these two schools arose because of the two different interpretations given by these commentators to one word 'pinda'. According to the traditional ancient Hindu law approach, the person who had the right to give Shraddha to a deceased had the right to inherit the property of the deceased. The Shraddha is a religious ceremony to satisfy the needs of spirit of

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the deceased by offering rice cake. In this regard *Manusmṛti* states that:

With the advent of the eldest son, the father becomes 'putravan' (पुत्रवान्) (having a son) and gets riddance from the debt of the manes. Therefore, he alone is entitled for his parental property. Only three (father, grandfather, great grandfather) deserve libations and offering of Pinda. The fourth is he who offers it. There is no room for any fifth in this reference. If there is no successor of above mentioned categories the property will go to sapinda circle nearest therein. If there are no sapinda claimants, property may go to the sakulya circle (from the lineage or race). In the absence of even the Sakulya persons, acarya or even disciple may inherit the property.[2]

ज्येष्ठेन जातमात्रेण पुत्री भवति मानवः।
पित्रूणामनृणश्चैव स तस्मात्सर्वमर्हति।।

त्रयाणामुदकं कार्यं त्रिषु पिण्डः प्रवर्तते।
चतुर्थः संप्रदातैषां पञ्चमो नोपपद्यते।।

अनन्तरः सपिम्डाद्यस्तस्य तस्य धनं भवेत्।
अत ऊर्ध्वं सकुल्यः स्यादाचार्यः शिष्यः एव वा।।[2]

jyeṣṭhena jātamātreṇa putrī bhavati mānavaḥ।
pitrūṇāmanṛṇaścaiva sa tasmātsarvamarhati।।

trayāṇāmudakaṃ kāryaṃ triṣu piṇḍaḥ pravartate।
caturthaḥ saṃpradātaiṣāṃ pañcamo nopapadyate।।

anantaraḥ sapimḍādyastasya tasya dhanaṃ bhavet।
ata ūrdhvaṃ sakulyaḥ syādācāryaḥ śiṣyaḥ eva vā।।[2]

Thus the *Dāyabhāga* has followed the traditional ancient Hindu law approach that the person who has the right to give śrāddha to a deceased has the right to inherit his property. For the

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same reason, there is no concept of coparcener property in the *Dāyabhāga*, because in coparcenery, there is inheritance at birth by the son in the ancestral property of his father.

In *Mitākṣarā*, however, Vijnaneshwar took a wholly different approach. By providing the right of unequal distribution only on self-earned wealth, he restricts the rights of father. According to Vijnaneshwar, the word 'pinda' does not mean the rice cake offered in the funeral ceremony at all. In other words, inheritance is by nearness of blood or propinquity, and it has nothing to do with the right to give shraddha. He takes the view that the right of son over ancestral property accrues by virtue of birth. This was a completely revolutionary approach adopted by Vijnaneshwar, as it was a complete break from the traditional Hindu law view and it is a good example how the law developed. *Mitākṣarā* is a much more secular law as compared to the *Dāyabhāga*, since, according to the *Mitākṣarā*, the right to inherit has nothing to do with the right to give shraddha. Thus, it may be seen that by giving two different interpretations given to a single word 'pinda' Hindu law got bifurcated and developed into two different branches.

Mitākṣarā system was adopted with certain local variations as considered necessary to suit the requirements of the area. On account of such adaptations, *Mitākṣarā* system came to be sub-divided into four branches or schools viz., The Banares School covering a substantial portion of Northern Inida; The Mithila School covering the northern part of Bihar; Mahārāṣṭra or Bombay School for Western India including Konkan; Dravid or Madrās School for Southern India. Each sub-division of the system acquired its name after the locality or territories in which the particular variation found acceptance by the people. All these sub-divisions acknowledge *Mitākṣarā* as the supreme authority. The great importance acquired by *Mitākṣarā* commentary is revealed by the fact that several commentaries came to be written

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on *Mitākṣarā* itself, of which specific mention may be made to the following: *Subodhinī* by Visweswara Bhatta. *bālambhaṭṭi* by Balambhatta. *Vaijayanti and Dattaka Mīmānsa* by Nandapandita.

***Vīramitrodaya* of Mitramisra:** This is a commentary on *Yājñavalkyasmṛti* composed in the early part of seventeenth century. Mitramishra happens to be the last among the outstanding and authoritative commentators on Hindu Law. *The Privy Council* recognizing the merit of this work observed:

"Their lordships have no doubt that the vīramitrodaya... is properly receivable as an exposition of what may have been left doubtful by the Mitākṣarā and declaratory of the law of the Banares school." [3]

In another case the *Privy Council* reterrates its earlier stand that:

"it supplements many gaps and omissions in the earlier commentaries and illustrates and elucidates with logical preciseness the meaning of doubtful prescriptions."[4]

With regard to the growth of law through commentaries Mayne states in his treatise on *'Hindu Law and Usage'*:

"Hindu law is the law of the Smṛtis as expounded in the Sanskrit Commentaries and Digests which, as modified and supplemented by custom, is administered by the Courts."[5]

The smṛtikaras and commentators did not exercise any sovereign power such as is possessed by the King or the legislature. Their authority was based on their deep scholarship and the respect which they commanded by their writings.

In the absence of the legislative institutions to amend the laws and an established judicial system whose decisions were binding as judicial precedents, the work of amending or modifying laws was preeminently performed by the great commentators whose

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views came to be accepted as authoritative and they acquired an important place in the Indian legal history. In this connection, it may be mentioned that in the guise of commenting on the Smṛtis, the commentators utilizing their creativity developed and expounded the Smṛti text in greater detail and differentiated between the Smṛti rules which continued to be in force and those which had become obsolete. They also incorporated new usages which had sprung up. The smṛtis and commentaries repeatedly stated that customs would override the written text. This principle made the Hindu law dynamic, because customs kept changing as society progressed.

The commentators paraphrased the narrow provisions and minimised the ambiguity. It must be acknowledged that their invaluable contribution to the development of Ancient Hindu law was remarkable. The commentators can be aptly described as the architects of Hindu legal system. They were held in very high esteem by the society and their view of the ancient texts became the contemporary law by force of their logic and expression, which came to be accepted by the society. Traditional law as applied by the courts under British rule depended more on the commentaries than on the Smṛti texts themselves.

Mulla in his treatise *Principles of Hindu Law* states that:

The law as laid down by the commentators was recognized by the Privy Council which declared that the provisions contained in the smṛtis were ancient and therefore it would be wrong to go by the letter of the Smṛtis, and the views of the commentators should be accepted as law in force.[6]

The *Privy Council* in its judgement held that:

The courts should not look into the earliest authorities to find out an answer to a disputed question of law but they should see, in a particular area, which of the views has received sanction by usage.[7]

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The commentators reflected the law as emerged from the age-old traditions as well as local usages while interpreting the law. Therefore, the *Privy Council* ruled that the court should recognize the law as interpreted by commentators even if such an interpretation was contrary to the wordings of the provisions in the Smṛtis.

From the foregoing discussion, it may be seen that the Hindu law was never static. Even the most ancient writers like Gautama, Manu, Yājñavalkya and others recognized the efficacy of sadācāraḥ as a source of law and later writers gave it an over-riding effect over even the written texts. Such customs were incorporated in the later Smṛtis or commentaries and digests. But the growth of the Hindu law came to a standstill after the great galaxy of commentators came to an end with the commentary of *vīramitrodaya* of Mitra Misra.

This might have been for the reason that the country was in a distressed condition for centuries owing to foreign invasions, foreign rule and frequent wars for such historical reasons the growth of law through illustrious commentaries suffered a setback. However, after the advent of the British Rule the growth of the Hindu law started again partly by judicial interpretation and partly by the legislative process.

Contribution of Engilish judges: Some English judges made a great contribution to the development of the Hindu law in spite of enormous difficulties they had to face in the interpretation of the same on account of their lack of knowledge of Sanskrit, which was the language of the Hindu Dharmaśāstrās, and also being unaware of the religious traditions, ancient usages and mode of life of the people. These difficulties were very well explained by the *Privy Council* in the following words:

"...At the same time it is quite impossible for us to feel any confidence in our opinion upon a subject like this when that opinion is founded upon authorities to which we have access only through

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translations and when the doctrines themselves and the reasons by which they are supported or impugned are drawn from religious traditions, ancient usages and more modern habits of the Hindus with which we are not familiar."[8]

Despite the formidable difficulties faced by the members of the Judicial Committee of the Privy Council, it must be said that their performance in moulding the Hindu law and their contribution to its development stand as a glowing tribute to the sincerity of purpose and devotion to duty of the judges of that highest tribunal. Mulla in his book *Principles of Hindu Law,* records his appreciation of the achievements of the *Privy Council* thus,

With their mastery of jurisprudential concepts and their unmatched forensic ability to expound and elucidate even the most complicated matters of unfamiliar laws affecting the personal status of parties, their lordships of the Privy Council evolved principles and laid down rules on varied and complex subjects in their own unique style, and generations of lawyers and judges in this country have acknowledged their indebtedness to that august Tribunal for the lead and guidance given by it. [9]

Legislative changes: Some modifications in the Hindu Laws were brought out during the British rule. Subject to the modifications made by Legislation, the Hindu law continued to be the personal law governing the Hindus prior to and after India's independence on 15th August 1947 according to *The Constitution of India:*

On the coming into force of the Constitution of India with effect from 26th January 1950, the Hindu Law as existing immediately before the commencement of the Constitution continued to be the law by virtue of Article 372 of the Constitution.[10]

After the Constitution came into force certain radical changes have been brought about by the enactments introduced

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by Parliament. Even with all the modernization these changes, on topics such as inheritance, succession, marriage, gifts, partition, and pious obligation, the old laws continue to operate subject to the legislative changes, and are enforceable in courts of law.

End Notes

1 *Arthasaṃgraḥ of L.Bhaskara.* Ed. S.Suptankar. (Delhi, Bhāratiya Vidya Prakasan, 1983) p. xvii.

2 *Manusmṛtisāram.* Editor: Keshoram Aggarwal. (Gorakhpure. Gita Press, 1999)IX-106, 186, 187

3 Jagannath Prasad V. Runjit Singh (1898), 25 Cal. 354 at 367-368; also Girajbai V. Sadashiv (1916) 43, I.A. 151 at 159.

4 Vadachela v.subramania, (1921), 48 1.A. 349 at 362.

5 *Hindu Law & Usage.* Ed. Justice Ranganatha Misra. (New Delhi. Bhārat Law House, 2010) p.1

6 Mulla. *Principles of Hindulaw.* (Bombay. NM Tripathi Private limited, 1986) p. 58

7 Pedda Ramappa V. Bangari Seshamma (1880), 8 I. A. 1

8 Collector of Madura V. Mootto Ramalinga (1868) 12, M.I.A. 397; Atmaram V. Baji Rao (1935). 62 I.A. 139

9 Mulla. *Principles of Hindu Law.* (Bombay. NM Tripathi Private limited, 1986)13th Edn, p.66

10 *The Constitution of India.* Editor: S.K. Agarwala. (Allahabad, Ram Narain lal Beni Prasad, Law Publishers, 1972) Article, 372

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Chapter - VII

Human Rights in Ancient Bhārat

History of Human Rights in modern world indicates that for the first time the human rights were recognized only when enactments were passed in America, providing equal rights to the Negros on account of the fight launched by Abraham Lincoln against slavery. The background appears to be the impact of industrial revolution of eighteenth century which led imperialism and spread slavery throughout the world. Up to the end of the 18th century, the Governments throughout the world adopted 'Police State'. Under this policy, it is observed, that the State could not give due importance to the welfare activities in the society.

There after only in the year 1945 the concept of Human Rights has spread worldwide when the United Nations Organization was established. Human rights are recognized as fundamental by the United Nations and, as such, feature prominently in the Preamble of the *Charter of the United Nations.*

Article 55 of the Charter narrates its objects about human rights as follows: "With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations, based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace." The United Nations shall promote:

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a) Higher standards of living, full employment, and conditions of economic and social progress and development;

b) Solutions of international economic, social, health, and related problems; and international cultural and educational co-operation; and

c) Universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.

Article 56 strengthens Article 55 and to achieve the objectives for human welfare and human rights directs that, "All Members Pledge themselves to take joint and separate action in co-operation with the Organization for the achievement of the purposes set forth in Article 55".

The *charter of Unite Nations Organisation* mainly concentrated for world peace and human rights. From the beginning of the Charter itself the objectives of the Charter are crystal clear devoting itself for the upgrading the living standards of every human being in the globe. The evolution of the international law of human rights has been one of the more remarkable features in international law since 1945, and most particularly after the establishment of Unite Nations Organisation. With the inspiration of the *Charter of Unite Nations Organisation, the Universal Declaration of Human Rights 1948* was made. It is a mile stone in the history of human rights. It has given the way to follow a series of treaties adopted within the United Nations. Among these the *"International Covenants on Civil and Political Rights (ICCPR)* is main which gives civil and political rights to every human being in the world. Appreciating the aims and objectives of all those Conventions, and Declarations of Human Rights, the Indian Parliament enacted *"The protection of Human rights Act, 1993"*. The object of this act is stated as:

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An Act to provide for the Constitution of a National Human Rights Commission, State Human Rights Commissions in States and Human Rights Courts for better protection of human rights and for matters connected therewith or incidental thereto.[1]

The human rights so pronounced now include, (i) the right to life, liberty and security of person (ii) prohibition against slavery and servitude (iii) prohibition against torture or cruel inhuman or degrading treatment (iv) prohibition against arbitrary arrest (v) the right to effective remedy or judicial redress of grievances before competent national tribunal which must function fairly and in accordance with internationally accepted principles of criminal jurisprudence (vi) the right to free speech, thought and expression (vii) the right to move freely (viii) the right to form associations or to vary on any vocation or profession (ix) freedom from want, (x) right to education (xi) right to shelter (xii) right to health care (xiii) freedom from exploitation in any form including trafficking and sexual exploitation (xiv) right to equality and non discrimination (xv) the right to preserve one's culture and traditions.

The enjoyment of these rights and freedoms also necessarily entails community structures that promote and protect these individual rights. This also involves, on the part of other persons and groups, respect for an individual's human rights. Since the establishment of Unite Nations Organisation, there has been a revolutionary change in the field of human rights throughout the world. These are of recent origin.

History of Human Rights in Ancient period: Whereas in ancient Bhārat Human Rights were recognized from times immemorial. It is relevant to refer as to how the human values were followed in the ancient society and state administration in our country. Utmost importance was given to the innate dignity of human life; respect and consideration for the others; the relation between humankind and environment thus the need to care and

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preserve the earth; the importance of integrity and service; an attitude of non violence and the individual and collective quest for peace and happiness.

David Frawley in his book *'The Myth of The Aryan Invasion of India'* observes that:

Putting together Vedic literature, the largest of the ancient world, a picture emerges of ancient India as the largest civilization of the ancient world with the largest and best preserved literature- a far more logical view, and one that shows India as a consistent center from which civilization has spread over the last five thousand years.[2]

Rigveda which is regarded as the oldest document declares that all human beings are equal and they are brothers. The *Atharvanaveda* declared that all human beings have equal right over natural resources. The Vedās including Upaniṣads were the primordial source of 'Dharma' which is a comprehensive term for all the human rights and duties, the observance of which was regarded as essential for securing peace and happiness to individuals and the society as well. This aspect is pointed out by the Supreme Court of India that,

"These fundamental rights represent the basic values cherished by the people of this Country since the Vedic times and they are calculated to protect the dignity of the individual and create conditions in which every human being can develop his personality to the fullest extent."[3]

Duty based rights: The unique method evolved by the great thinkers who molded the civilization and culture of India was to secure the rights to every individual by creating a corresponding duty in other individuals. Therefore, every kind of right evolved became the values of Bhāratiya culture and were based on the duty of every individual towards other individuals. For example, the duty of parents towards their children, and the duty of sons and daughters as the case may be to maintain their parents in old age and duty of teachers towards their students, duty of students

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towards their teachers, duty of every individual in a family towards other coparceners and other members of the concerned human society, duty of the State towards citizens, duty of the citizens towards the State, were all created to protect the basic human rights. The creation of a duty in one individual necessarily resulted in the creation of right in other individual.

Therefore, instead of treating the right as the basis of social life and establish a right based society, the ancient philosophers of this land preferred to establish a duty-based society where the right given to an individual emanates from the duty entrusted to others in accordance with the principles of dharma. This fundamental approach to life has been clearly laid down and understood in all ancient literature. To illustrate, in *vishnupurana* there is an entire chapter which is devoted to defining the territorial boundaries as well as the basic philosophy of this Country. In one of the verses therein, the importance given to duty in this land is emphasized. It reads:

Among the various countries, Bhārat is regarded as great because this is the land of duty in contradistinction to others which are lands of enjoyment, i.e., based on rights.[4]

अत्रापि भारतं श्रेष्ठं जम्बूद्वीपे महामुने।
यतो हि कर्मभूरेषा ततोन्या भोगभूमयः।।

नवयोजन साहस्रे विस्तारोऽस्य महामुने।
कर्मभूमिरियं स्वर्गमपवर्गञ्च गच्छताम्।।[4]

atrāpi Bhārataṃ śreṣṭhaṃ jambūdvīpe mahāmune। yato hi karmabhūreṣā tatonyā bhogabhūmayaḥ।।[4]

navayojana sāhasre vistāro'sya mahāmune।
karmabhūmiriyaṃ svargamapavargañca gacchatām।।[4]

Mahatma Gandhiji who personified all the human values evolved in India eulogized this idealism in his book '*My picture of free India*' in the following words:

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"India is essentially Karmabhumi (land of duty) in contradistinction to Bhogabhumi (land of enjoyment)".[5]

It has great significance. It means that according to the Bhāratiya culture, every one owes a duty towards others. By this method right of an individual was made part of the duty of other individual.

Right to equality: Right to equality is perhaps the most valuable right, without which happiness is impossible. Unjust discrimination always results in misery and unhappiness to those discriminated against. *ṛgveda* which constitute the primordial source of Dharma declared charter of equality as under:

No one is superior or inferior. All are brothers. All should strive" for the interests of all and should progress collectively".[6]

अज्येष्ठासो अकनिष्टास एते।
सं भ्रातरो वावृधुः सौभगाय।।[6]

ajyeṣṭhāso akaniṣṭāsa ete। saṃ bhrātaro vāvṛthuḥ saubhagāya।।[6]

ṛgveda further directs,

"Oh human beings, all of you should, live together with mutual cooperation, Converse with each other in a friendly manner, Acquire knowledge having common ideals of life." "All your prayer and desires be similar and for common good, All your get-togethers be without separatist feeling. All of you be united in thought, word and deed." "Let there be oneness in your resolutions, hearts and minds. Let the strength to live with mutual cooperation be firm in you all."[7]

सङ्गच्छध्वं सं वदध्वं सं वो मनांसि जानताम्।
समानो मन्त्रः समितिः समानी समानं मनः सह चित्तमेषाम्।

समानी व आकूतिः समान हृदयानि वः।
समानमस्तु वो मनो यथा वः सुसहासति।। [7]

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saṅagchadhvaṃ saṃ vadadhvaṃ saṃ vo
manāṃsi jānatām।

samāno mantraḥ samitiḥ samānī samānaṃ manaḥ
saha cittameṣām।

samānī va ākūtiḥ samāna hṛdayāni vaḥ।samānamastu vo
mano yathā vaḥ susahāsati।।[7]

Atharvaveda says: *"All have equal rights in articles of food and water. The yoke of the chariot of life is placed equally on the shoulders of all. All should live together with harmony supporting one another like the spokes of a wheel of the chariot connecting its rim and hub."*[8]

समानी प्रपा सह वोन्नभागः।
समाने योक्त्रे सह वो यनज्मि। आराः नाभिमिवाभितः।। [8]

samānī prapā saha vonnabhāgaḥ। samāne yoktre saha vo
yanajmi। ārāḥ nābhimivābhitaḥ।।[8]

Thus the right to equality of all human beings has been declared in the Vedās, which were regarded as inviolable. In order to emphasize the dignity of individual, it was declared that all are brothers, which meant that all are children of God. Therefore, it was declared that no one is inferior or superior. Similarly, the verse in *Atharvanaveda* declared that all have equal right over natural resources and all were equally important as spokes in a wheel. Both the *ṛgveda* and *Atharvanaveda* declared that cooperation between individuals is necessary for happiness and progress. It is nothing but the concept of interdependences which is highlighted to seek optimum performance in corporate circles in the present day context as envisaged by a renowned author Stefen Chove in his "Seven Habits of Effective life". It is also of utmost importance to note that right to equality was made part of "Dharma" long before the State came to be established.

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It is equally interesting to refer to the contents of Article 1 and Article 7 of *Universal Declaration of Human Rights.* They read, "All human beings are born free and equal in dignity and rights. They are endowed with reasons and conscience and should act towards one another in a spirit of brotherhood. *Universal Declaration of Human Rights -1.* All are equal before law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination. *Universal Declaration of Human Rights -7* This declaration made in 1948 is exactly similar to the declaration of equality made in *ṛgveda* from times immemorial.

Duty of State to give equal protection: After the establishment of the state the obligation to protect the right to equality was cast on the Rulers. It was made a part of the rules of rājadharma, the Constitutional Law of Ancient Bhārat. The king, conducting himself always in conformity with rājadharma, should appoint all his servants to work for the welfare of his people. *Manusmṛti* says that:

Protecting subjects is the supreme duty of a king. Because only that king is supposed to be religious who enjoys fruits (tax etcl) enjoined in the scriptures only. When the king sustains all his subjects just as the earth sustains all beings mobile or immobile, then he is supposed to be acting like Prithivi.[9]

क्षत्रियस्य परो धर्मः प्रजानामेव पालनम्।
निर्दिष्टफलभोक्ता हि राजा धर्मेण युज्यते।।

यथा सर्वाणि भूतानि धरा धारयते समम्।
तथा सर्वाणि भूतानि बिभ्रतः पार्थिवं व्रतम्।।[9]

kṣatriyasya paro dharmaḥ prajānāmeva pālanam।
nirdiṣṭaphalabhoktā hi rājā dharmeṇa yujyate।।

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yathā sarvāṇi bhūtāni dharā dhārayate samam।
tathā sarvāṇi bhūtāni bibhrataḥ pārthivaṃ vratam।।[9]

This also meant that the kings were required to afford equal treatment to all the citizens in the same manner in which a mother treated all her children. In this regard it is appropriate to refer to the judgment delivered by the thirteen-judge Bench of the Supreme Court of India, that:

The right to equality constitute one of the elements of basic structure of the Constitution of India which cannot be amended or altered even by Parliament.[10]

It may also be noted that the right to equality and prohibition against discrimination are incorporated in Articles 14, 15 and 16 of the Constituttion of India.

Right to education: As to the importance given to education in ancient Bhārat, it is sufficient to quote the saying of the great Sanskrit poet Bhartruhari of the First Century B.C.

"Education is the special manifestation of man; Education is the treasure which can be preserved without the fear of loss; education secures material pleasure, happiness and fame; education is the teacher of the teacher; education is the friend when one goes abroad; education is God incarnate; education secures honour at the hands of the State, not money; a man without education is equal to animal."[11]

विद्या नाम नरस्य रूपमधिकं प्रच्छन्नगुप्तंधनं विद्याभोगकरीयशः सुखकरी
विद्यागुरूणां गुरूः।

विद्या बन्धुजनो विदेशगमने विद्या परं दैवतं विद्या राजसूपूजिता नतुधनं
विद्याविहीनः पशुः।।[11]

vidyā nāma narasya rūpamadhikaṃ
pracchannaguptaṃdhanaṃ

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vidyābhogakarīyaśaḥ sukhakarī vidyāgurūṇāṃ guruḥ।
vidyā bandhujano videśāgama ne vidyā paraṃ daivataṃ
vidyā rājasūpūjitā natudhanaṃ vidyāvihīnaḥ paśuḥ॥[11]

In the above verse, Bartruhari, king of Ujjain turned philosopher apart from highlighting the importance of education to life, equated man without education to an animal. By saying so, he wanted to impress upon every one about the pious obligation to acquire and disseminate knowledge to the next generaton. In this connection a direction given in *ṛgveda* can be referred to which says that 'Study yourself, acquire knowledge and disseminate the same to others. (svādhyāya pravachanena). This aspect of our civilization was referred to by the Supreme Court in a case in which while holding that right to educate must be regarded as a fundamental right, the Court said thus:

"Indian civilization recognizes education as one of the pious obligations of the human society. To establish and administer educational institutions is considered a religious and charitable object. Education in India has never been a commodity for sale". [12]

But now it appears that imparting education has become a lucrative commercial venture probably on account of deterioration of human values. Again in a judgment the Supreme court referred to the importance of education as emphasized in the ' Nītiśatakam' by Bhartruhari and held that:

Right to education is therefore part of fundamental right under Article 21 of the Constitution of India.[13]

In this connection a verse in '*Hitopadesha*' also can be referred to which explains that:

Education imparts intellectual culture; intellectual culture secures capacity and suitability. Capacity and suitability enable to secure wealth; wealth so secured enables to conform to Dharma which in turn secures Happiness."[14]

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विद्य ददाति विनयं विनयाद्याति पात्रताम्।
पात्रत्वाध्दनमाप्नोति धनाध्दर्मं ततः सुखम्।। [14]

vidya dadāti vinayaṃ vinayādyāti pātratām।
pātratvādhdanamāpnoti dhanādhdarmaṃ
tataḥ sukham।। [14]

The human right to education is aimed at securing happiness. Therefore, it should not be confined to literacy. The aim of education should be all-round development of personality, intellectual, mental, moral and physical and to make an individual an asset to the human society. This aspect is highlighted in Shikshavalli Lesson eight in *taittirīya Upaniṣad,* which reads:

Happiness is this; youth should be of good character, learned, resolute and strong morally and physically. Then only earth will be full of prosperity and wealth.[15]

युवा स्यात्साधु युवाऽध्यायकः आशिष्ठो द्रढिष्ठो बलिष्ठः।
तस्येयं पृथिवी सर्वा वित्तस्य पूर्णा स्यात्। स एको मानुष आनन्दः। [15]

yuvā syātsādhu yuvā'dhyāyakaḥ āśiṣṭho draḍhiṣṭho
baliṣṭhaḥ।
tasyeyaṃ pṛthivī sarvā vittasya pūrṇā syāt। sa eko
mānuṣa ānandaḥ। [15]

The lesson is highly enlightening. It declares that education means and includes, intellectual, moral and prosperity of any Nation is directly proportional to the number of men of character it has produced, through proper education which secures all-round development and personality of all its individuals. The Right to Education is one of the Human Rights vide Article 26 of the Universal Declaration.

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Right to protection: The right to protection of the people was created by casting duties on the Rulers as part of rājadharma, the Constitutional Law of Ancient Bhārat. It applied to all the Rulers, who might be ruling in any part of the territory of Bhārat. *Manusmṛti* says that:

The highest duty of a King is to protect his people. The King, who receives the prescribed taxes from his subjects and protects them alone, acts according to Dharma as enshrined in the scriptures.[16]

क्षत्रियस्य परो धर्मः प्रजानामेव पालनम्।
निर्दिष्टफलभोक्ता हि राजा धर्मेण युज्यते।।[16]

kṣatriyasya paro dharmaḥ prajānāmeva pālanam।
nirdiṣṭaphalabhoktā hi rājā dharmeṇa yujyate।।[16]

This basic human right was sought to be protected by incorporating a specific rule in rājadharma to the effect that the State was under a duty to protect every religion without discrimination. It is stated in *Dharmakośa* that:

The King should afford protection to compacts of associations of believers of Veda as also of disbelievers in Veda and of others.[17]

पाषण्डनैगमश्रेणीपूगव्रातगणादिषु।
संरक्षेत्समयं राजा दुर्गे जनपदे तथा।।[17]

pāṣaṇḍanaigamaśreṇīpūgavrātagaṇādiṣu।
saṃrakṣetsamayaṃ rājā durge janapade tathā।।[17]

The above rule of Dharma is unique. It required the State to give equal protection not only to believers in God or Vedās, but also disbelievers. That is the width of freedom of thought, belief and faith recognized as the basic human right in Bhārat, as part of rājadharma which is secularism par excellence. In this connection the article 18 of *Universal Declaration of Human rights* which is similar also can be referred to which says:

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Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance.[18]

The same concept is embodied in our constitution also. Article 25 reads as, "Subject to public order, morality and health and to the other provisions of this Part, all persons are equally entitled to freedom of conscience and the right freely to profess, practice and propagate religion." Thus the concept of secularism is given the pride of place in our constitution.

Special rights of women: Undoubtedly the right to equality and all other human rights are all applicable to men and women, equally. However, the ancient Bhāratiya thinkers considered that having due regard to the special attributes of womanhood they require special protection because it is undisputable that women are vulnerable to the possible molestations by men of evil propensities. 'Hitopadesha' of nārāyaṇa, a compilation of code of conduct may be referred here. In that, in his inimitable style, nārāyaṇa says that:

"A person who regards, others wife as his own mother; every woman other than his wife as equal to his own mother; who regards wealth, which belongs to another as equal to a clot of earth and who regards every other individual, as his own self, is an educated man in the real sense of the term." [19]

मात्रुवत्परदारेषु परद्रव्येषु लोष्टवत्।
आत्मवत्सर्वभूतेषु यः पश्यति स पण्डितः।।[19]

mātruvatparadāreṣu paradravyeṣu loṣṭavat।
ātmavatsarvabhūteṣu yaḥ paśyati sa paṇḍitaḥ।।[19]

There can be no doubt that inculcating such a value is the great safety against the attacks by men of bad character. The

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creation and maintaining of this value is really the most valuable contribution of Indian thinkers to humanity. Apart from creating the value of respect for womanhood, there have been special provisions for protecting several human rights of women, in view of the disabilities and vulnerability of women for attack by men. Principles of Dharma created an obligation on the part of the male members of a family to afford protection to every woman at every age and stage of life. Further, under rājadharma it was the duty of the State to provide protection to women as it is traditionally believed that all efforts end in smoke if women are not respected. A special and honourable place is given to women in Bhāratiya samskrti. *Manusmṛti* says that:

"The angels rejoice in the homes where women enjoy a respectful position. All efforts are fruitless where they are not adored."[20]

यत्रनार्यस्तु पूज्यन्ते रमन्ते तत्र देवताः।
यत्रैतास्तु न पूज्यन्ते सर्वास्तत्राफलाः क्रियाः।।[20]

yatranāryastu pūjyante ramante tatra devatāḥ।
yatraitāstu na pūjyante sarvāstatrāphalāḥ kriyāḥ।।[20]

The principle of Dharma which made it the duty of male members of the family to afford protection to women is stated in *Manusmṛti* as under:

"Father protects the girl during her childhood, the husband protects her after marriage and her sons protect her in old age. At no stage a woman should be left unguarded."[21]

पिता रक्षति कौमारे भर्ता रक्षति यौवने।
रक्षन्ति स्थविरे पुत्रा न स्त्री स्वातन्त्रयमर्हति।।[21]

pitā rakṣati kaumāre bhartā rakṣati yauvane।
rakṣanti sthavire putrā na strī svātantrayamarhati।।[21]

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The meaning and purpose of the aforesaid verse is that a woman requires and is entitled to protection at every stage of life. Correspondingly, it is the duty of the father, the husband and the sons to look after her as daughter, wife and mother respectively. It is not a directive to subjugate or dominate women. Therefore, to interpret the verse to the effect that it is a directive to treat a woman as a slave by his father during her childhood and by her husband after her marriage and by her sons in old age, and that she should be deprived of freedom throughout her life is wholly erroneous and perverse.

Here an interpretation of the verse given in correct perspective can be referred to. Kerry Brown, a British Woman author in her book *"The Essential Teachings of Hinduism"* as referred to in *('Seeds of Modern Law in Ancient Indian Jurisprudence')* has stated the real meaning of the controversial verse in *Manusmṛti* thus:

In Hinduism, a woman is looked after not because she is inferior or incapable but, on the contrary, because she is treasured. She is the pride and power of the society. Just as the crown jewels should not be left unguarded, neither should a woman be left unprotected. No extra burden of earning a living should be placed on women who already bear huge responsibilities in society; childbirth, child-care, domestic well-being and spiritual growth. She is the transmitter of culture to her children.[22]

The important role assigned to women has been correctly identified. It is no doubt true that the times have changed. We have women who are competent in various professions, business magnates, competent political rulers, bureaucrats, technocrats, advocates, judges and what not! In many cases, they have surpassed men. But the fact remains that their responsibility as mothers to look after the interests of their children and to transmit cultural values to them and to make them good citizens has not decreased but has increased in view of the prevailing hostile environment.

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It is for the reason that women are vulnerable to attack in many ways by men, the duty to afford protection to the person and property of women throughout their life had been made part of the rājadharma. This is also indicated by a provision in the ancient law of India. An exception is provided to Women's Property from law of adverse possession. The provision of ancient Indian law regarding confirming title to an immovable property by adverse possession was made inapplicable in respect of property belonging to women, State and Temple. According to *Kātyāyanasmṛti* as mentioned in the *vyavahārachintamani*:

"No plea of adverse possession is tenable in respect of property belonging to women, State and Temple".[23]

न भोगं कल्पयत्स्त्रीषु देवराजधनेषु च।
बालश्रोत्रियवित्ते च प्राप्ते च पत्रुतः क्रमात्।।[23]

na bhogaṃ kalpayatstrīṣu devarājadhaneṣu ca।
bālaśrotriyavitte ca prāpte ca patrutaḥ kramāt।।[23]

The sanctity of the special right conferred on women evolved in our culture has been emphasized by the Supreme Court of India in the case against Air India. In the service rules of the employees working in Air India, there is a provision stating that an Air Hostess shall stand terminated on her first pregnancy. While striking down the said rule Supreme Court of India observed that:

"Coming now to the second limb of the provision according to which the services of Air Hostess would stand terminated on first pregnancy, we find ourselves in complete agreement with the argument of Mr. Setalvad that this is a most unreasonable and arbitrary provision which shocks the conscience of the Court"... It seems to us that the termination of services of an Air Hostess under such circumstances is not only a callous and cruel act but an open insult to Indian womanhood- the most sacrosanct and cherished

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institution. We are constrained to observe that such a course of action is extremely detestable and abhorrent to the notions of a civilized society. Apart from being grossly unethical, it smacks of a deep sense of utter selfishness at the cost of all human values"[24]

Right to social security: All individuals do not possess the capacity or resources to lead a happy life. Many individuals suffer from abject poverty, want of education or earning capacity, physical or mental deformity, disease, old age, loss of earning member of the family etc. but all such individuals have the basic human right to happiness, even in misery. This right is sought to be protected by creating duty in individuals on whom they depend as also on the State. In *Mahābhārat*, explaining the principle of "Dharma" it is said that:

"Free from anger, truthfulness, sharing wealth with others, forgiveness, procreation of children from one's wife alone, purity, absence of enmity, straightforwardness, maintaining persons dependent on oneself are the nine rules of Dharma of persons belonging to all the varnas.[25]

अक्रोधः सत्यवचनं संविभागः क्षमा तथा।
प्रजनः स्वेषु दारेषु शौचमद्रोह एव च।।
आर्जवं भृत्यभरणं नवैते सार्ववार्णिकाः।[25]

akrodhaḥ satyavacanaṃ saṃvibhāgaḥ kṣamā tathā।
prajanaḥ sveṣu dāreṣu śaucamadroha eva ca।।

ārjavaṃ bhṛtyabharaṇaṃ navaite sārvavārṇikāḥ।[25]

It is a matter of pride that in Indian civilization this duty or pious obligation has been discharged in an exemplary manner. An individual earning member never thought of himself or his wife and children alone and considered others as burden. He always considered that it was his sacred duty to maintain aged parents, unemployed or minor brothers and sisters, widowed sisters if any

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or any other member of the family or those members who are physically or mentally handicapped. He used to provide shelter, food, clothing, medicine, education, perform marriage etc. and never considered it as a burden.

Though this wholesome arrangement is being upset by purely selfish attitude of individuals under the influence of the modern civilization set-up, it is still dominating social life in India. The provision on this aspect in the *Universal Declaration of Human Rights* is Article 22, which reads:

"Everyone as a member of society, has the right to social security and is entitled to realization, through national effort and international cooperation and in accordance with the organization and resources of each State, of the economic, social and cultural rights indispensable for his dignity and the free development of his personality."[26]

Thus, right to social security as a human right recognized in Bhāratiya Culture holds good for all times and to the entire humanity. It is more comprehensive in the sense that it casts the primary responsibility, in this regard, on the head of the joint family ie., the earning member, before looking for the help from others including the exchequer of the State.

Protecting of human rights even during and after war: Human rights were regarded as sacrosanct in this land, since times immemorial, is evidenced by the rules which prescribed that even during and after winning wars, certain human rights were required to be respected and protected in respect of prisoners. Protection of human rights even when a person was apprehended by public servants for offences alleged to have been committed by him or even after conviction and sentenced to undergo imprisonment was also envisaged. In this regard Rama Jois in his book *"Seeds of Modern Public Law in Ancient Indian Jurisprudence and Human Rights- Bhāratiya Values"* refers to Kautilya and quotes from The *Kautiliya Arthaśāstra* as under:

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An officer who obstructs or causes to obstruct prisoners in their daily routine such as sleeping, sitting, eating, etc., shall be liable to be punished with fines ranging from 3 panas and upwards.[27]

धर्मस्थीयाशरकात्रिसारयतो बन्धगाराच्छयूयासनभेजनोच्चार।
संचारं रोधबन्धनेषु त्रिपणोत्तरातण्डाः कर्तुः कारयितुश्र, बन्ध
नागारात्सर्वस्व बधश्च। [27]

dharmasthīyāśarakātrisārayato
bandhagārācchayūyāsanabhejanoccāra।

saṃcāraṃ rodhabandhaneṣu tripaṇottarātaṇḍāḥ kartuḥ
kārayituśra, bandha nāgārātsarvasva badhaśca।[27]

About how a servant has to be treated is mentioned long back in *Apastamba sutra.* The distribution of the food must be made in such a way that:

if there is any shortage of food, the householder may stint (reduce the share) to himself, his wife and children, but by no means the food due to a servant should be reduced.[27]

This corresponds to Article 23(3) of human rights which reads:

"Everyone who works has the right to just and favourable remuneration ensuring for himself and his family an existence worthy of human dignity, and supplemented if necessary, by other means of social protection."[27]

The pattern in which the Hindu society continued to evolve shows that everything was done and every person lived for the society, its welfare and improvement. The welfare concept of the society or the state which was appreciated for the first time in the West only in the eighteenth century was practically organized by the Indian thinkers at the very threshold of the organization of the human society. This is revealing in the scriptural literature of the Ancient Bhārat. It is clearly found therein that the life of every one

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including that of the King implied a bundle more of duties than of rights. Everyone was to do something for the society-not only of men but also of beasts, birds and plants. Hence there arose a very wide and genuine conception of charity in India from the very beginning.

Every contribution was with a view to the adding to the welfare of the society. This also greatly helped the economic adjustment and redistribution. It was thus no wonder that in India the society grew out more of sacrifice than the self-indulgence in luxury. The king would think that it was his duty to satisfy the subjects-whatever is the cost. The Indian joint family system which was the miniature form of the society was based essentially on this wide liberality and deep sympathy. Thus the teaching of the ancient Hindu society was self-sacrifice for others, for the rest of the society. This is what, is the exact spiritual achievement of the Hindu culture and society. The administration of the ancient Indian society was thus based on social welfare. It may be quoted here the highest ideal of human life, evolved in India, as incorporated in a short but meaningful manner in the most popular prayer, "Let all people be happy, and free from diseases. Let all see auspicious things and no body suffer from grief."[28]

सर्वे जने सुखिनस्सन्तु सर्वेसन्तु निरामयाः।
सर्वे भद्राणि पश्यन्तु मा कश्चिद्दुःखमाप्नुयात्।।[28]

sarve jane sukhinassantu sarvesantu nirāmayāḥ। sarve bhadrāṇi paśyantu mā kaścidduḥkhamāpnuyāt।।[28]

End Notes

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Chapter – VIII
Conclusion

Vedic period: Though law in the Vedic period was mixed up with the moral and religion it always kept pace with the social changes in that remote past and established its nature as dynamic and never static, whatever may be the social upheavals. *ṛgveda* is the oldest and also the very foundation of all Vedic literature. Not only the religion of the Vedic people, but also the details of their social, political and cultural outlook can be inferred from the Veda. Over the course of the Vedic period, it appears, a transition was made from a cow-based herding economy to an agrarian one. The social structure of Vedic India had a number of important features. It can be inferred that the early government was a clan based system, which eventually became a true government, with taxes and a bureaucracy.

In addition to the belief in King's divinity, being a military chief King used to exercise power to maintain law and order so that people could safely pursue their activities and develop. Monarchy was the normal form of Vedic polity but it appears to be a limited constitutional monarchy. Two popular assemblies namely Sabhā and Samithi were found to exercise control over the general administration and also over the King. The autocracy of the Vedic King was limited by democratic checks such as the election and

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expulsion through these two assemblies. *Atharvaveda* says that: the majority view should be honoured.

Vedic democracy also knew about the vote of majority for which they used "Narishtha".[1]

बहवः सम्भूय यदि एकं वाक्यं वदेयुः तत् हि न परैः अतिलङ्घनीयम्।.[1]

bahavaḥ sambhūya yadi ekaṃ vākyaṃ vadeyuḥ tat hi na paraiḥ atilaṅghanīyam।.[1]

Sāyana explains this as the voice of the many. It is pertinent to note that in such remote past they observed the democratic principle. It would normally be not possible to reach such level of maturity in the administration of public affairs without sufficient historic background. The tradition of popular assembly is continuing successfully till date and India is proud of its exemplified democratic and traditional values. Great importance was attached, not only to concord between the King and the Assembly, but also to a spirit of harmony among the members of the Assembly.

Having evolved the concept of enforceability of the law through the institution of kingship, ancient Indian jurists proceeded to define the law. ṛtam denoting, the supreme transcendental law or the cosmic order that maintains the symphony in the universe. The ethical aspect of ṛtam is synonymous with the dharma as a moral base. The directions of this Order or ṛtam were reflected in Yājña with a prayer for the common good of all the people. Conception of dharama or sacred law is a fundamental principle which characterizes the political thought of the Hindus. It sustains the universe and ensures the welfare of all sections of the community which owe obedience to it. It was the bounden duty of the King to abide by, and give effect to it.

Dharma is having a wider connotation than what we understand by the term 'law'. The concept of law, as understood

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in ancient India, is based on dharma which includes responsibility, justice, righteousness, law, religion, and morality. Law was recognized as a mighty instrument necessary for the protection of individual rights and liberties. As against the view of western jurisprudence, law in the Hindu jurisprudence was recognized as superior to the sovereign i.e., a command even to the King. The law aided by the power of the King enables the weak to prevail over the strong.

Sūtra literature: Basing on the principles of Dharma the Srauta and gṛhyasūtrās regulated religious rituals and personal code of conduct at the four stages of āśramās ie., Brahmacharya, gaṛhasta, vānaprastha, and sanyāsa. Dharmasūtrās also deal with the rules of moral and religion but they treat with special emphasis on matters relating to the administration of justice. They constitute the foundation of Hindu legal system and created a first written code providing a base for the future enactments. They gathered the customs and some rules of positive law scattered here and there and formulated them as topics of vyavahāra . Though their applicability was limited to certain schools they covered the details of judicial system embracing the legal character.

It appears that there was sufficient progress in the judicial system by the time of sutra period. In Dharma sūtrās particularly Gautama describes the different sources from which the King had to draw upon for the purpose of administration of justice. About his characteristic features as head of the administration of justice Gautama says that he shall be truthful and impartial in his approach towards his subjects, always aim at their wellbeing and protect them in accordance with justice.

He directs that the administration of justice should be strictly in accordance with the sacred law. He also provides that the usages and customs which are not opposite to sacred law should be taken into consideration. Thus the customs started attaining the force of

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law. Another important feature was that there was no reference to the divinity of the King and he had stressed that the reason should be the means to arrive at the truth and the decision should be based on it. He suggests that the King can take the advice of his spiritual teacher in critical issues and be never in enmity with him. He mentions about the proportionate punishments, and observes that to speak truth before the judge is more important to a witness than all other duties. Gautama's observation providing special authority to cultivators, traders, herdsmen, money-lenders, and artisans to lay down rules for their respective classes indicates the developments in Agriculture, Industry &commerce etc., in those times as well as the adjustments in law to follow the progressive changes that take place in the contemporary society.

During the sūtrā period the institution of kingship got strengthen. The subjects dealt under vyavahāra continued to grow from the time of Gautama and became an elaborate code in the *Visnusmṛti* which is known as last in the sutra literature. The development of the law in the King's court as evidenced by the manuals of the Dharmasūtrās clearly indicates that sound procedures in the matter of administration of justice were established by that time.

Judicial system in smṛti period: The smṛtikaras did not arrogate to themselves the position of lawmakers, they claimed only to be exponents of divine precepts of law and compilers of the traditions handed down over generations. Smṛtis were a compendium of principles for the regulation of human conduct. Composite in their character, they were a blend of religious, moral and social duties.

King as chief administrator of justice: The Dharmasūtrās and the *Arthaśāstra* reveal to us a more or less full-fledged and

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well developed judiciary. The King was at its head and he was to attend the court daily to decide disputes. It was his sacred duty to punish the wrong-doers. rājadharma ordained that the administration of justice is the personal responsibility of the king himself and thus gave prime importance to the administration of justice. The institution of 'kingship' was established primarily to enforce dharma. The King used to exercise his powers to impose punishment on those who transgress the path of Dharma and to provide protection to those who follow dharma. According to Kautilya any matter in dispute shall be judged according to the four planks of justice. These, in order of increasing importance, are: Dharma, based on truth, Evidence based on witnesses, Custom, i.e., the tradition accepted by the people, and Royal Edicts, i.e., law as promulgated.

The smṛtis had unequivocally stated that it was the basic responsibility of the King to protect the people through proper and impartial administration of justice and that alone could bring peace and prosperity to the King as well as to the people. Ancient Indian jurists bestowed great attention in evolving the law governing administration of justice. Smṛtis dealt comprehensively all the aspects of the legal system ie., description of the various courts their composition and location, qualifications of judges and other officers of courts including the assessors, procedures of law in relation to a legal dispute its trial, evidence, and the judgement.

According to Manu the King should decide the eighteen types of cases taking into consideration other factors like place cast family traditions, local usages besides the injunctions of the śāstrās according to their merits separately. It is said in *nāradīyamanu Saṃhitā* also that when it is impossible to act up to the precepts of sacred law, it becomes necessary to adopt a method founded on reasoning, because custom decides everything and overrules the sacred law. In *Mahābhārat* it is stated that as law abiding person

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who knows the principles of Dharma, King has to ensure that all the people to follow the rule of law.

Substitution of the King: Yājñavalkya says that if the King is unable, to look after the law-suits himself, owing to some pressing cause, a brāhmaṇa who is well versed in sacred law should be appointed as an administrator of justice along with the other members. Word brāhmaṇa indicates a learned person without any relevance to caste system in the present day connotation. In *Mahābhārat* it is stated that a person endowed with the qualities of truth, charity, patience, good nature, compassion, penance, and kindness, is called a brāhmaṇa. In *Manusmṛti* it is stated that the King or his representative should not concoct a case or dismiss a case presented by somebody with an intention of realizing money. The King was not entitled to make any law himself; he was simply to execute the law and apply it in deciding the disputes for which he had both original and appellate jurisdiction.

Another important aspect discernible from the above provisions is that rājadharma made a clear distinction between judicial, executive and legislative functions. This doctrine of separation of powers ensured judicial independence from administrative directions. It paved way for smooth functioning of all the three branches.

Disputes arising, if any, between people who are closely related, such as teacher and student, father and son, husband and wife, master and servant were to be sorted out at their level only. Their relationship stands on a special footing having sanctity as per bhāratīyasaṃskṛti. As such normally they are not allowed to institute legal proceedings because the publicity of such disputes may cause adverse impact on the society.

Courts and staff: Bṛhaspati describes four kinds of sabhā or courts: pratiṣṭhitā or established in a place; Apratiṣṭhitā or moving

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from place to place; Mudrita or the court in which the chief judge is an appointee of the King and has the royal seal; śaśita or the court headed by King himself. He divides the sabhā into ten parts or Angas. These are: the King, the chief judge, the Sabhyās, Smṛtis, gaṇaka or accountant, Lekhaka or scribe, gold, fire, water, and Svapurusa or bailiff. Kātyāyana and Bṛhaspati prescribe specific time for holding the court.

Many other institutions are described in Smṛtis which decide the disputes. These institutions of private arbitration are quite close to the modern Pañcāyatās. These are; Kulani; śreṇi, pūga, and gaṇa. It is mentioned in *Bṛhaspatismṛti* that the Kula, śreṇi and gaṇa courts could decide all disputes except those falling under the title sāhasa. Fines and corporal punishments could only be inflicted by the King. A śreṇi can review the decision of a Kula, and a gaṇa has the power to review the decision of a śreṇi. Judges have power to review the decisions of a gaṇa, and the King is the highest court of appeal and his decision is final.

It may be observed here that in ancient India these village Pañcāyatās and guild courts were appreciated and encouraged by the then rulers for several reasons. They believed in the principle of self-government and decentralization of authority right up to grass root level and it may not be correct to say that these institutions at village level were created during the British rule.

Special Courts: Not only mobile courts but also special courts were created to cater to the requirements of certain groups ie., those dwell in forests, military personnel and merchants in the caravans etc. It only indicates the importance given to render justice fast even by reaching to different places as per requirement. These compare well to the various tribunals presently functioning ie., Industrial tribunal, Administrative tribunal, Debts recovery tribunal, Military courts, and fast track courts etc.

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Staff: Courts were provided with sufficient staff to assist the judges and assessors. Accountant well versed in calculations, Judge's clerk and court clerk for recording statements and other matters, bailiff for serving of summons are the regular staff for attending the routine work in the court.

Judges and assessors: King is the head of the administration of justice. He can appoint the chief judge and other judges to assist him. A person who is well versed in laws, regulating judicial proceedings ,and dharma, a Profound scholar, well versed in the law of evidence, law abiding, and has fully studied the Vedās and logic should be appointed to carry on the administration of justice. In additions to these, King can appoint some assessors to assist in the matter of adjudication. Like the chief judge, these Sabhyās should be learned brāhmaṇas; when brāhmaṇas are not available, the King can employ kṣatriy*ās* or Vaiśvās if they are proficient in Vedās, but not Sudras. Kātyāyana holds that the authority to decide suits lies with judges and Sabhyās. Kātyāyana lays down that some merchants should be included in the court. They should be such men from guilds who are of high families, character, well advanced in age, of good conduct, wealthy, and free from malice. Prāḍvivāka or the Chief Justice, who deputized for the King during his absence, was naturally a legal luminary of high reputation. According to Kautilya there shall be established a bench of three judges who shall hold court at frontier posts, sub-district headquarters, and provincial headquarters as necessary.

Appointment of Judges and their qualifications: The most interesting feature of the judicial administration was the system of jury. Even the king and the chief justice could not begin the trial of a case, if they were not assisted by a panel of jurors. It is said in *Śukranīti* that the assembly in which there are seven, five or even three brāhmaṇās versed in human affairs, the Vedās and Dharma Śāstrās is august and solemn like one on the occasion of sacrifice.

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The number of jurors was deliberately kept uneven to provide for the contingency of a difference of opinion. They were to be fearless exponents of what they believed to be the correct legal position. A juror keeping silence knowing that something is going wrong is to be condemned. It was their duty to restrain a willful King going astray and giving a wrong decision. A number of famous jurists maintain that the King or presiding judge is to be guided by the verdict of the jury. *In Śukranīti* it is said that in cases which are impossible to decide finally and which are of a doubtful character, e.g., those relating to boundaries, etc., the King as the supreme lord is at liberty to proceed as per his discretion.

The educational attainments and personal traits of a person to be appointed as a judge, specifically provided for, shows the importance attached to that position and how one was expected to conduct oneself as a judge. According to Kautilya the magistrates were to discharge the functions of executive and judicial. The magistrates were in charge of criminal investigation and assisted revenue officials in collecting taxes and dues. These duties compare well with those of present District Collectors who also exercise both the executive and magisterial powers.

Conduct rules framed for judges were very strict. Exemplified character is expected from them. They should behave themselves beyond any suspicion. Accountability on the part of judges is made very strict so that they would be doubly careful in awarding decrees so that a genuine person is not put to loss. Threat of punishment hangs on false judge and false witness equally. No such threat of punishment appears to be operating there in the modern judicial system.

Topics of Law: The titles of law are termed as " vyavahāra pada". Yājñavalkya mentions civil suits as artha vivada.Bṛhaspati and Kātyāyana state that the law suits originate in disputes over wealth or injuries. In the case of civil topics the cause of action arises on account of breach of the terms of a contract entered into

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by the parties whereas in the case of criminal topic the cause of action arises on account of an injury caused intentionally to one by another individual which act is in violation of any established public criminal law.

The eighteen topics of law dealt by Manu are adopted in almost all the major Smṛtis, with an important modification of making distinction between civil and criminal law. With regard to these two branches the procedures adopted and the relative remedies provided also differ. In the case of disputes relating to debt etc., pecuniary relief is provided for. In the case of the topics relating to sāhasa and other offences, punishment is prescribed. A clear demarcation is observed with regard to the civil and criminal offences. King should not initiate civil action; it is for the person whose right is violated whereas in the matter of criminal offences it is the primary responsibility of the King or his representative officers to initiate action sue moto on mere information after due investigation. Apart from eighteen major topics, law had been laid down on a variety of subjects under the heading 'miscellaneous matters'

Trial: A legal procedure can be instituted when a person aggrieved by others in a way which is opposed to smṛti and good conduct, and reports the matter to the King. According to Bṛhaspati the legal procedure has four parts. The plaint is considered to be the first part and the reply the second; the trial is said to be the third part, and the decision the fourth. Sufficient care has to be taken in drafting a plaint. It is said that a plaint should be brief in words, rich in content, unambiguous, free from confusion, devoid of improper arguments and capable of being traversed by the defendant and it should set out the prayer sought against the opponent. He makes it clear that the plaintiff may amend the plaint by subtraction or addition as long as the defendant does not submit their reply in the presence of the judges. But he cannot be permitted to make out an entirely a new case under the pretext of amending it.

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When the plaint is free from defects and the defendant having taken cognizance of its content, should file his reply. The reply may be of four kinds viz., admission, denial, special plea and former judgment. The provisions in the Smṛtis regulating the contents of plaints and written statements are remarkable and they bear similarity on almost every aspect covered by Orders 6, 7 & 8, of C.P.C. On the lodging of a plaint, it was open to a plaintiff to put restraint of any kind on the defendant. The ancient law gave that power to the plaintiff subject to several restrictions where as in the modern law plaintiff can only seek temporary injunction from the court to impose any restriction on the defendant. After examining the reply of the defendant the judge shall fix the burden of proof on either of the two parties. The 'burden of proof', will be placed with regard to any given issue on that party who would fail on that issue if no evidence is adduced. After the respective declarations were recorded by the court and a decision regarding burden of proof was given by it, the third stage in a vyavahāra was the trial. During this stage, the parties to a case were required to adduce evidence.

A party to litigation could appoint another person, well versed in law, to represent his case before the court. Such a person was called a Niyogi. Only a person well versed in the substantive law and procedural law is entitled to represent parties in a court, and take remuneration for his services. These are like present day advocates.

Every judicial proceeding had to culminate in rendering of the judgment by the King or the chief justice or the court, as the case might be. The main planks basing on which a judgment can be arrived at are: three types of human evidence, i.e., oral, documentary, and possession; logical inference, the usages of the country, oaths or ordeals, the royal edict and admission of the parties.

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A judgment ie., Jayapatra is a document which incorporates the contents of the plaint, the answer, the gist of the trial, the consideration given to them and the decision by the judges thereon with the royal seal. With regard to the appellate jurisdiction of King Kātyāyana says that if a party is not satisfied with the decision of the lower court and thinks his cause has been decided and punishment or order declared in any way contrary to justice, he can seek reconsideration of the said judgment at the hands of the King who had the authority to set aside impugned judgments.

The provisions and grounds for review indicate that the aim of the procedural law was to ensure to render justice to the party who had really suffered an injury. The power of the King contained in the above provisions corresponds to the power of the Supreme Court of India under Article 136 of the Constitution.

Law of Evidence: The main object of the law of evidence is to help the courts to ascertain the truth. The rule laid down by the Smṛtis was that the plaintiff or the defendant who asserted the existence of facts should adduce evidence to prove word by word the facts in the issue. If the defendant admits the claim made against him before the judges the case ends there itself. If the claim is not admitted, then the judgment shall be based on the evidence of trustworthy witnesses, who shall be persons known for their honesty and approved by the Court.

Kātyāyana makes it clear that the statement of a witness as to whatever has been perceived or experienced by him because of his being present at the time of the transaction should be accepted and not otherwise. Documentary and oral evidence were well known. The other mode of proof by which a party could prove his pleas was by undergoing one of the various types of ordeals which were then in vogue. Circumstantial evidence is that which trends to establish the fact in issue by providing another fact which though does not itself conclusively establish that fact, affords an inference as to

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its existence. The smṛtikaras struck a note of caution in drawing conclusions from circumstantial evidence as there would be more possibility in arriving at wrong decisions.

Witnesses: A person who has directly seen or heard or experienced the matter in dispute is called as witness. This means that the evidence of a witness must be direct and should not be what is called hearsay. Production of witnesses either appointed or unappointed, before the judge it is the responsibility of the parties to the dispute. Nārada says that the witnesses shall be of honorable family, straightforward, and unexceptionable as to their descent, their actions, and their fortune. The witnesses shall not be less than three in number, unimpeachable, honest, and pure-minded. Manu says that in the case of violence, theft, adultery, defamation and assault, the competence of witnesses shall not be examined too strictly. Despite receiving summons, being not sick, if a person refuses to turn up to the court he would be punished. Provision for payment of subsistence allowance to a witness was there. Witnesses were under legal compulsion to give evidence before the court. Failure to appear before the court entailed heavy penalty.

Great sanctity was attached to the act of giving oral evidence before the courts. For this purpose, the Smṛtis provided that after administering the oath and before recording the evidence, the judges should impress upon the witnesses the greatness of telling the truth, and of the sin which they would incur by giving false evidence. The king should not delay in examining the witnesses. A serious defect, namely, miscarriage of justice, would result owing to delay in examination of witnesses. This rule is a very salutary one worthy of emulation as witnesses are likely to forget important links or facts as time passes. Under the evidence Act, there is no disqualification other than those mentioned in sec 118.

Documents: According to Nārada documents are said to be of two kinds, in one's own handwriting and in that of another person;

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without witnesses and with witnesses respectively. Document written by the King is called royal edict. These are three kinds: dānapatra a royal grant, prasādalekha mark of Royal favour and Jayapatra a decree in a suit. Documents written by the common people are of seven kinds dealing with Partition, Gift, Purchase, Mortgage, Agreement, Bondage, and Debt. Documentary evidence excludes oral evidence and ordeals. Sec. 92 of the Indian Evidence Act. is similar to this provision. The document bearing the royal seal should be presumed to be genuine even when all the parties to such document are dead. Invalidity, proof of doubtful nature and the presumption in relation to documents bear similarities with the provisions in the modern law. In disputes regarding immoveable property, ordeals should be rejected and only documentary and possessory evidence are to be accepted.

Whatever defect there may be in the documents or witnesses, they should be raised at the time of trial. The judge should not hold the witnesses ineligible after they have deposed. Bṛhaspati says that the party about whose witnesses or documents any objection is raised in a suit cannot proceed with his case until he clears those objections. In this regard the Order XIII rule 1 of CPC also states that the parties or their advocates, at the first hearing of the suit itself, should produce documentary evidence of every description in their possession which they intend to rely on if the same had already not been filed.

Possession: Possession is acceptable if it fulfills the following five requirements: if it is supported by a title, of long standing, uninterrupted, not claimed by others, and in the presence of the defendant. This means that possession can be proof only when supported by Title. An exception to this is provided. When possession has been successively held, even unlawfully, by the three ancestors of the father of the present possessor, he becomes the owner. If somebody comes up with a title to it also cannot take

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away from him. Houses, lands and such things, which are used without title, by friends, relations or collaterals, do not become forfeited by use.

Ordeals and Oaths: When the parties to litigation were unable to prove their case by means of oral or documentary evidence, the courts could allow the parties concerned to prove their case through divine tests or ordeals. It is very difficult to positively view the evidentiary value of ordeals unless one imports oneself into the context of such ancient times where almost all abide by the principles of dharma and believe in superstitions. Over a period as per yuga dharma it was felt that the Ordeals adopted as a means of proof have absolutely no rational basis. It may be observed that the Smṛti writers realized the changes that took place in the society and honouring the concept of yugadharma, understood the irrationality or dangers of resorting to prove a case by ordeals. This is evident from the specific provisions set out later which excluded altogether the ordeal method when human evidence was possible. According to Manu If there is a case without a witness and the two parties contradict each other and the King is not in a position to know the reality he may ask the parties to take oaths and swear.

Crime and Punishment in Ancient Bhārat: Even in Vedic period effective attempts were made to ensure the well being of the society. The concept of welfare state was well appreciated in ancient Bhārat and it appears sufficient care was taken to ensure the same. This aspiration must have contributed to give deep thought to the process of eradicating the offences in the society. The Vedic period throws much light on the subject of crime and the relative punishment.

The concept of guilt is very clear in Vedās. There are many ṛks. containing prayers to various gods requesting them to free the sinners from the sin. The *ṛgveda* states that the wise made seven limits to the human beings violating even one of them

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leads to incur sin. The Nirukta describes the seven sins as: Theft, Violating an elder's bed, murder of a *brāhmaṇa*, murder of a fetus, drinking of liquor, repetition of an offence, telling lie as to a sinful matter. Arrest and imprisonment to the offenders is also found in *Atharvaeda.* If the offenders do not get reformed then they are to be punished. There were advices to give protection to the children of the sinners. Robbery is also described in *Atharvaveda* and prayers are mentioned to catch hold of such people and put them in solitary confinement.

The concept that the punishment should be proportionate to the gravity of the offence dates back to the Vedic period. According to Gautama and Manu the guilty should be punished only after fully considering the magnitude of his crime, the place and time of crime, the physical and monetary condition of the guilty and the nature of the crime committed. It throws light on the principle that the guilt or the offence alleged to have committed should be proved beyond reasonable doubt before imposing any punishment. The same concept reflects in the provisions of *Indian Penal Code.*

Daṇḍa Nīti: The *Gautama Dharmasūtrās* states that the word 'daṇḍa' is derived by the wise from the root 'dam' to control, conveys the idea of controlling or suppressing. The King should control by means of daṇḍa those who observe no restraint. Kautilya states that daṇḍa is one of the seven elements that constitute a state. The power of punishment is vested in the King and that the rules that guide the king are called 'Daṇḍanīti'. To protect the subjects from incurring sin, and to put them on righteous path, King should hold the 'daṇḍa' the rod of punishment.

According to Manu the ultimate sanction behind the state is force. If it is not used, the alternative is the law of the jungle ie., matstyanyaya. It is Daṇḍa, physical punishment which rules over all the subjects; it is Daṇḍa which protects them; when all else are sleeping, Daṇḍa keeps awake; law is nothing but Daṇḍa itself. Thus

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the entire social well-being is thus dependent upon it. The purpose of it is similar to that of our criminal major Acts like Indian Penal Code and Indian Evidence Act etc.

The concept of imposing punishment, causing pain, mental or physical is based on three factors, one is to create a sense of repentance leading to the reformation of the offender and the other is to cause deterrent effect on others besides ensuring that it is proportionate to the gravity of the offence committed.

Sources of Hindu Law: In ancient legal literature five principal sources of law were identified. They are śruti, Smṛti, Sila, Svasya priyam and sadācāra. In addition to these, subsequently, the commentaries, judicial precedents and legislation have played a great role as sources of Hindu Law.

According to Gautama the administration of justice shall be regulated by Veda, the institutes of the sacred law, the Vedāṃgās and the Purana. The customs of countries, castes and families which are not opposed to the sacred laws have also authority. Manu has further elaborated to say that all Vedās, the Smṛtis of well versed Vedic scholars and their good conduct, the norms followed by the persons of high moral principles and finally self-satisfaction are the roots of dharma. He also observed that Vedās, Smṛtis, noble conduct and self-appealing; these four are the deciding factors of Dharma. This is further improved upon by Yājñavalkya , that the Veda, the Smṛti, practices of the good and their way, what is agreeable to one's conscience and the proceeding from good intention, are the sources of law. Manu has further clarified that every custom could not acquire the force of law. The custom or usage, in order to secure social recognition, must be acceptable to honest and reasonable persons, whose character and conduct is beyond reasonable doubt. This appears to be a residuary provision which, in fact, had taken care of the possible future requirements. This has also provided for matters not covered by the śruti and

smṛtis. This provision was fully utilized by the great galaxy of jurist commentators, to adapt the law to suit the needs of the changed circumstances.

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Kautilya's *Arthaśāstra* indicates well developed society and good structure of judicial institutions. There appears to be a long gap thereafter as the matters mentioned therein did not find adequate place in the subsequent literature.

The Vedic culture appears to have provided a common base line to various sections of the ancient society. As observed earlier, the customs and usages of different sections of society played great role in the development of law in Ancient India. It was also possible that the development of vast kingdoms and empires might have forced the need for a common code to properly govern the entire community. The institution of King got strengthened over a period, expanding its judicial purview. In any case, we find that the smṛti literature contributed for a substantial development in the evolution of law in ancient Bhārat. It was a great attempt to consolidate and crystallize a complete code of laws on the basis of known and then existing texts, usages and customs from different sources.

In all the systems of law, more or less customs have been recognized as one of the most important sources of law. The Historical school of jurisprudence takes customs as the true type of law. This is a general theory regarding the origin of custom and law. The custom is sometimes superior to the law provided the essential conditions are fulfilled. To be valid a custom must be ancient, continuous, established by clear and unambiguous evidence, reasonable and not against morality or public policy. The British courts also recognized the force of custom. Mayne in his treatise on *Hindu law and Usage* observes that:

"Under the Hindu Law, clear proof of usage will outweigh the written text of law".[2]

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The conventions or trade usage formed another source of law. In order to make them known to the public, specific provision was made in the Smṛtis for the registration of such provisions under the royal Seal. Where two Smṛtis come into conflict, principles of equity, as determined by popular usages (logical) shall prevail.

Legal Texts: From 7th century on wards smṛti literature virtually stopped growing. After a gap of two to three centuries the period of legal texts known as commentaries and digest started appearing. Several eminent jurists wrote commentaries on the Smṛtis during their respective times and made the Smṛti laws practical, understandable and workable by codifying almost on the lines of the procedures obtaining in the modern system of judicial administration. These legal texts played a great role in developing the law and created a smooth path for application of smṛti laws to the contemporary society keeping in view the changes that take place as time passes.

Legislation: legislation also is a very important source especially of modern Hindu law. Legislation was steadily responsible for the systematic development of Hindu Law particularly from the later part of the 19th century.

Adjudication: Strictly speaking, adjudication by the courts is not an independent source of law, in as much as, the courts are supposed to apply and interpret the existing law. But the fact remains that even the courts sometimes make new law in course of this interpretation and application. Interpretation played a very important part in the development of Hindu law through the commentators also.

Development of law through Legal Texts: In ancient India not only was there tremendous development of other disciplines like mathematics, astronomy, medicine, grammar, etc., but there was also tremendous development of law. It is an established fact that the law and society are most inextricably connected with each

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other. Thus law is a social concomitant. This close relation again is primarily responsible for the corresponding changes in law when there are changes in the society. As far as west is concerned, the sociological method of studying law and jurisprudence is of recent origin. Whereas this aspect was well recognized in Ancient Bhārat and the fact that its growth depends on the progressive changes that take place in the society was well appreciated. The smṛtis naturally covered almost all the branches of law which the society then needed. Smṛti literature virtually stopped from seventh century on wards. Thereafter the law had to grow and modify only through other works, such as commentaries and digests written by eminent jurists. This was practically the only device for the development of law. The reasons are obvious. The Smṛtis continued to be the basic law of the Indian legal system.

Some of the important problems appeared to be that on certain issues the smṛtis contained conflicting provisions; certain provisions were ambiguous and on certain other matters, the smṛtis were silent. The language of the smṛtis was difficult in certain cases and required skilful interpretation. As far as procedures are concerned many changes were required to meet the developing society. The aforesaid problems were ably and successfully met with by the works of eminent jurists or commentators with the aid of Mīmānsa the rules of interpretation. In fact the importance of mimansa was well recognized which could emancipate Hindu Law from subjective interpretation and gave it finality. These commentaries and digests written by eminent jurists from time to time with necessary adaptations have fulfilled the requirements of a changing society. Various schools of law founded on the basis of these commentaries govern different parts of India. The most renowned commentaries and digests are briefly discussed below.

Mitākṣarā, however, Vijñāneśvara takes a wholly different approach with regard to the inheritance of property. According to Vijñāneśvara, the word 'pinda' does not mean the rice cake offered

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in the funeral ceremony at all. In other words, inheritance is by nearness of blood or propinquity, and it has nothing to do with the right to give shraddha. Whereas Jeemutavahana founder of the *Dāyabhāga* school has followed the traditional ancient Hindu law approach that the person who has the right to give shraddha to a deceased has the right to inherit his property. Thus it can be observed that by giving two different interpretations to a single word 'pinda' Hindu law got bifurcated and developed into two different branches.

In this connection, it may be mentioned that in the guise of commenting on the Smṛtis, the commentators utilizing their creativity developed and expounded the Smṛti text in greater detail and differentiated between the Smṛti rules which continued to be in force and those which had become obsolete. They also incorporated new usages which had sprung up. The smṛtis and commentaries repeatedly stated that customs would override the written text. This principle made the Hindu law dynamic, because customs kept changing as society progressed. The commentators paraphrased the narrow provisions and made it précised the ambiguity. It must be acknowledged that their invaluable contribution to the development of Ancient Hindu law was remarkable. The commentators can be aptly described as the architects of Hindu legal system. They were held in very high esteem by the society and their view of the ancient texts became the contemporary law by force of their logic and expression, which came to be accepted by the society.

The commentators reflected the law as emerged from the age-old traditions as well as local usages while interpreting the law. Therefore, the Privy Council ruled that the court should recognize the law as interpreted by commentators even if such an interpretation was contrary to the wordings of the provisions in the Smṛtis. By virtue of the specific provisions of the Smṛtis indicating that sadācāraḥ (usage or custom) approved by the society as one of

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the sources of law, immemorial customs acquired the force of law. Consequently, customs and usages formed one of the dominating factors in the evolution of the Hindu legal system. This position was recognized by the Privy Council as early as in the year 1868.

From the foregoing discussion, it may be seen that the Hindu law was never static. Even the most ancient writers like Gautama, Manu, Yājñavalkya and others recognized the efficacy of sadachara as a source of law and later writers gave it an over-riding effect over even the written texts. Such customs were incorporated in the later Smṛtis or commentaries and digests. But the growth of the Hindu law came to a standstill after the great galaxy of commentators came to an end with the commentary, *vīramitrodaya* of Mitramisra.

This might have been for the reason that the country was in a distressed condition for centuries owing to foreign invasions, foreign rule and on account of frequent wars owing to historical reasons the growth of law through illustrious commentaries suffered a setback. However, after the advent of the British Rule the growth of the Hindu law started again partly by judicial interpretation and partly by the legislative process.

Despite the formidable difficulties faced by the members of the Judicial Committee of the Privy Council, it must be said that their performance in moulding the Hindu law and their contribution to its development stand as a glowing tribute to the sincerity of purpose and devotion to duty of the judges of that highest tribunal. Mulla in his Hindu Law, records his appreciation of the achievements of the Privy Council. Mayne's in his *'Hindu Law & Usage* observed:

"Hindu law is the law of the smṛtis as expounded in the Sanskrit commentaries and digests which, as modified and supplemented by custom, is administered by the courts."... "According to one view it was legislation by sages of semi-divine authority or, as was put later, by ancient legislative assemblies."[3]

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On the coming into force of the Constitution of India with effect from 26th January 1950, the Hindu Law as existing immediately before the commencement of the Constitution continued to be the law by virtue of Article 372 of the Constitution. After the Constitution came into force certain radical changes have been brought about by some enactments introduced by Parliament. Mulla in his treatise *Principles of Hindu law* observed:

"Even with all these changes, on topics such as inheritance, succession, marriage, gifts, partition, pious obligation, the old laws continue to operate subject to the legislative changes, and are enforceable in courts of law."[4]

Human ritghts: With the beginning of the nineteenth century only the concept of human rights spread throughout the world particularly with the birth of the United Nations Organization. Whereas in ancient Bhārat Human Rights were recognized from times immemorial. *ṛgveda* which is regarded as the oldest document declares that all human beings are equal and they are brothers. The *Atharvanaveda* declared that all human beings have equal rights over natural resources. The concept of dharma is a comprehensive term for human rights on which the whole edifice of duty based society was established. On account of this Bhārat earned the fame as karma bhumi the land of duty whereas the western world is known as Bhoga bhumi the land of enjoument. The fundamental rights enshrined in the constitution and the directions envisaged in the preamble reflect some of the basic principles of bhāratīyasaṃskṛti built on the foundation of Dharma.

The pattern in which the Hindu society continued to evolve shows that everything was done and every person lived for the society-its welfare and improvement. The welfare concept of the state which was appreciated for the first time in the West only in the eighteenth century was practically organized by the Indian thinkers at the very threshold of the organization of the human society. This

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is revealing in the scriptural literature of the Ancient Bhārat. It is clearly found therein that the life of every one including that of the King implied a bundle more of duties than of rights.

It was thus no wonder that in India the society grew out more of sacrifice than the self-indulgence in luxury. The King would think that it was his duty to satisfy the subjects-whatever may be the cost. The Indian joint family system which was the miniature form of the society was based essentially on the broad thinking with compassionate outlook. Thus the teaching of the ancient Hindu society was self-sacrifice for the well being of others in the society. The highest ideal of human life, evolved in India, as incorporated in a popular prayer reads that

"Let all people be happy, Let all be free from diseases, Let all see auspicious things, Let no body suffer from grief".[5]

सर्वे जनाः सुखिनौ भवन्तु सर्वे सन्तु निरामयाः।
सर्वे भद्राणि पश्यन्तु मा कश्चित्दुःखभाग्भवेत्।।[5]

Concluding observations: With regard to the elaborate law of procedure envisaged by the Smṛti writers D. Pathak, in his *Introduction to Hindu Law*, as mentioned in the *Legal and Constitutional History of India* observes:

"Some of the ancient rules of law propounded by the śrutikaras, Smṛtikaras and Nibandhakaras, take us by surprise by their strikingly modern character and outstanding insight into jurisprudential concepts. The Hindu jurists not only developed substantive law applicable to Hindus, but also formulated side by side the adjective law for the enforcement and establishment of the substantive law". [6]

Rudiments of the jurisprudence in ancient Bhārat can be traced to Vedic period. Jurisprudence is the philosophy of law. It discusses in a general way as to what is law, what is its purpose, how it originates, how does it develop, what are its basic concepts and structure, how it is related to the other socio economic and cultural

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changes that take place in a contemporary society. *ṛgveda* contains many indications as to the origin and growth of law. It reflects the concept of Bhāratiya Jurisprudence. *ṛgveda* is unequivocally accepted as the oldest treatise in the world. Hence it may be conclusively proved that the jurisprudence of Bhārat is the most antiquarian and more ancient than any segment of jurisprudence in any country under the globe.

It is surprising to find that the basic features of 'Ancient Judicial system of India conforms, in many respects, to those obtaining in the present day system. For example, the method in which plaints and the defense statements were to be prepared, the rules of pleadings, the checks to restrain the misuse of the right to resort to legal course, the law and the procedure of recording the evidence, the systematic way in which a legal dispute should be conducted, not allowing the oral evidence wherever documentary evidence was required, not accepting hearsay evidence and insisting for direct evidence, the principle of fixing the burden of proof, the procedure for appeal or review are some of the items common both to the ancient and the present system. With regard to this aspect the *Fourteenth Report of first Law Commission* said:

"We can even hazard the view that had the ancient system been allowed to develop normally, it would have assumed a form not very much different from the one that we follow today." [7]

In view of the above, inference can be safely drawn that the ancient judicial system is the source and fountain head for the modern system.

In *Kaundinya smṛti* it is suggested that:

A person, proficient in law, only be appointed as Judge and provide assistants to help him in deciding the cases. Maximum time limit of two months may be fixed for the disposal of a case. If the higher court dismisses the earlier decision of the lower court, the judge of the lower court should be given punishment so that he would not give

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such improper decisions in future. The officers who are responsible for the delay in disposing of the cases by partiality, or by taking bribe, or enmity or laziness should definitely be punished.[8]

न्यायाधिकारिणं कुर्यान्न्यायमार्गविशारदम्।
नियुञ्जीतास्यकतिचित् सहायान् कार्यनिर्णये।।

क्लेशो महान् विलम्बे स्यात् प्रजानां न्यायनिर्णये।
गरिष्ठं कालमानं स्याद् द्विमासं न ततोऽधिकम्।।

उच्चन्यायालयैः पूर्वनिर्णये चान्यथाकृते।
दण्ड्यः पूर्वाधिकार्येवं न स कुर्याद्यथा पुनः।।[8]

nyāyādhikāriṇaṃ kuryānnyāyamārgaviśāradam।
niyuñjītāsyakaticit sahāyān kāryanirṇaye।।

kleśo mahān vilambe syāt prajānāṃ nyāyanirṇaye।
gariṣṭhaṃ kālamānaṃ syād dvimāsaṃ na tato'dhikam।।

uccanyāyālayaiḥ pūrvanirṇaye cānyathākṛte।
daṇḍyaḥ pūrvādhikāryevaṃ na sa kuryādyathā punaḥ।।[8]

In ancient judicial system, throughout the legal process, sufficient care was taken at every stage right from the beginning of submission of plaint to the delivery of judgment to avoid delays. Adjournments were restricted to the barest minimum. Truthfulness of deposition was ensured by allowing only those as witnesses who bear good conduct. The system was not allowed to become a victim of technicalities. Provision for punishment was there against false witnesses and also against improper behaviour of judges. The executive and judicial powers though had a clear demarcation yet being exercised by the institution of King and his representatives the delays in implementation of the decisions appear to be restricted to the barest minimum.

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In addition to the eighteen topics of law as mentioned in *Manusmṛti* many other miscellaneous issues are dealt as to how they could form the subject matter of a legal dispute. Classification of topics into civil and criminal and the related procedures bear many similarities to those obtaining in the present system. A variety of topics such as contract, money lending, safe custody, levy of tax on commercial transactions, controls for price fixation etc., were dealt in detail. Various aspects of master servant relationship, wage fixation and other social security measures bear similarities to the present trends.

It is noteworthy that the maxim "Rule of law" was strictly followed in the ancient judicial system of India. The rule of law is a legal maxim which provides that no person is above the law, that no one can be punished except for breach of the law and no one can be convicted except in the manner set forth by the law itself. The rule of law stands in contrast to the idea that the ruler is above the law. It shows how meticulous the ancient legal system functioned strictly in accordance with the principles of natural justice.

Law is a concomitant of social change. When customary law was its main content its growth was very slow. Now it is not the case. To catch up with the fast changes that are taking place legislation and judicial precedents are accelerating it. Even then looking to the present context it appears that it still needs to improve its speed to keep pace with the rapid changes that have been taking place in our country owing to industrial and scientific development. Can it indicate that the legislation and the judicial precedents are not providing the required support to the dynamic nature of law to accelerate its progress? May not be so because the parliament and the State Legislative bodies have been issuing thousands of statutes and regulations for the well-being of people. Have they contributed to further complicate the procedures by infusing more technicalities instead of providing checks against misuse of the

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system? What are the ills that confront the present system causing delays in rendering justice promptly?

In this connection some observations made in the *14th Report of the First Law commission under title* "Reform of Judicial Administration", appointed by the Government of India have some relevance. The report said that:

Even the Uttar Pradesh Judicial Reforms Committee of 1950-51 stated, though by a majority that "it cannot be denied that the rules of procedure and evidence which they (the British) framed to regulate the proceedings in court, were in some cases foreign to our genius and in many cases were made a convenient handle to defeat and delay justice." But in the same report it is said that there was a view providing general support to the existing system on the ground that during British rule while adopting their model of legal system they had taken into consideration the conditions prevailing in India. Even then the Law Commission observed that, "It may be that we have failed to make our laws and our court systems and procedures conform sufficiently to the needs of our people. To that extent, no doubt, they require modification and adjustment." The Report further said, "but such changes can only be made within the frame work of a system suited to our present conditions and needs, which are the needs and conditions of a highly organized welfare society with a developing industrial economy"[9].

Again referring to the Uttar Pradesh Report they observed that: "*We agree with the observations of the Uttar Pradesh Judicial Reforms Committee that "the need of the hour is that rules and procedures and evidence should be so simplified that justice may be available to the rich and the poor alike and that it may be prompt and effective".*[10]

Around five decades elapsed since these observations made by the Law Commission. Continuous efforts also must have been made to improve the system during this period. But still a wave of

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dissatisfaction pervades the country that our judicial system is not able to meet the requirements of the fast changes that are taking place in our country and elsewhere; with the result it is lagging behind in providing support to maintain harmony in the society.

The law that is administered today is no longer the customary law. In fact, thousands of statutes and regulations control down to the minutest detail the lives and activities of every citizen of this country. The legislatures both at the Centre and in the States have undertaken reforms of a far-reaching nature affecting the well-being of millions of citizens. But, still it is falling short of requirement. One view is that the existing enactments are not effectively being used owing to dearth of trained personnel to properly implement the existing laws. The other factor which is apparent that the infrastructure provided to the wing of judiciary is not at all sufficient to meet the needed requirement. Some learned persons in this field argue that the doctrine of separation of powers enshrined in the Constitution of India is not allowed to operate properly owing to various pressures on the legal process from the vested interests

Another important factor causing delay is the technical aspect of long winding procedures dictating the legal process. In fact, on account of the influence of the western jurisprudential theories during the period of British rule and thereafter, the spiritual and moral aspect of the Hindu concept of law appears to have been eroded to some extent and the technical aspect of the procedure stands disproportionately increased. It is always desirable to strictly follow the system to avoid transgression of the related procedure but the cumbersome nature of the system should not provide ambiguities to cause unwanted delays and giving a way to the guilty to wriggle out from the ambit of charges. Whatever it may be, an aspiration to strengthen the judicial system is gaining ground in the country. Ancient Hindu Judicial System encompasses huge canvass with a mixture of moral and religion concepts besides law.

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It provides lot of scope for further study to bring out useful factors if specific items of judicial system are taken up for study.

Any how some of the simple procedures like conservative approach of granting adjournments, discreet approach of brushing aside the unwanted technicalities which are not useful in arriving at a decision, stress on purity of evidence while approving a witness, judge taking initiative to find truth, threat of punishment on judges and witnesses for abuse of their positions and concern for quick delivery of justice seen in the Ancient Judicial System can be considered to assimilate in the present legal system. It's a fact that with the ever increasing population, the volume of disputes is also bulging. It is no secret that the very thought of facing the courts in India leaves the common man with a sense of dread and despair; cases drag on interminably. This position should be changed. Effective system of justice delivery only can improve people's faith in the institution of judiciary and the rule of law as they form the essence of democratic governance. It is desired to examine the following suggestions to improve the functioning of judicial system in our country.

Along with the adversarial system the concept of inquisitorial system also can be adopted in complicated cases particularly of criminal nature. Adversarial system is now followed in our country where the role of the court is primarily that of an impartial referee between the prosecution and the defense. In this normally Judge does not pose questions direct to witness or through his advocate for the fear of eroding his neutral posture. He never takes any initiative to explore ways to discover the truth and plays a passive role. The system is heavily loaded in favour of the accused. It provides an escape route for many criminals to wriggle out from the net of charges. Whereas in inquisitorial system Judge can take initiative not only questioning the accused and other witnesses but also monitor the investigation process. The goal of both the adversarial system and the inquisitorial system is to find the truth.

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But the adversarial system seeks the truth by pitting the parties against each other in the hope that competition will reveal it, whereas the inquisitorial system seeks the truth by questioning those most familiar with the events in dispute. In ancient judicial system, judge used to ask questions in search of truth followed by search for proof.

Public interest litigation can be encouraged to protect environment and also to reach out common man fast. Public Interest Litigation means litigation for the protection of the public interest. Many complaints do not see the light because of the fear from antisocial elements. Public Interest Litigation may be an antidote for such things. The court can itself take cognizance of the matter and proceed suo motu or cases can commence on the petition of any public-spirited individual. According to Kautilya King used to appoint the magistrates who used to specially look into criminal offences and also undertake investigation in addition to exercise judicial functions. This type of functioning is almost similar to the inquisitorial concept and Public Interest Litigation system.

A special wing of committed and devoted officers with special skills and forensic knowledge may be created to undertake investigation. In ancient judicial system Suchakas, were appointed by the King to keep a watch on antisocial elements and bring to the notice of the King, about the crimes in the society. Whereas Stobhakas voluntarily used to do that function and get some reward from the King.

Plea-bargaining concept came into being vide Criminal Law Amendment Act, 2005. Plea-bargaining provides a facility to strike an agreement between the prosecuting and defense attorneys to resolve a case without trial. Under this arrangement, the accused party changes its plea from 'not guilty' to 'guilty' or agrees to testify against an accomplice, in exchange for a less severe punishment or

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dismissal of some charges. The court and the accused, however, must approve any such settlement. In our country almost all criminal cases which are not withdrawn must go to trial and judgment. Plea-bargaining can be seen as an alternative method to deal with the staggering arrears of criminal cases. Its application can be stepped up which may also alleviate the sufferings of the under trial prisoners.

Article 20(3), of the constitution of India states that, "No person accused of any offence shall be compelled to be a witness against himself". And the Code of Criminal Procedure, 1973, prohibits adverse inferences being drawn from the deliberate silence of the accused. At least in terrorist-related offences, the right of the accused to remain silent should give way to the larger interests of society. It would lead for quick disposal of cases.

It is well known fact that India's population to judge ratio is one of the lowest in the world. On priority basis infrastructural deficiencies in judiciary have to be obviated.

More number of 'Fast Track Courts' can be established for quick disposal of cases.

On the model of people's courts of ancient judicial system many courts can be organized at rural centers.

Alternate Dispute Redressal Mechanism under Arbitration Conciliation Act of 1996 can be stepped up for reducing pendency of cases through arbitration, negotiations conciliation and mediation.

Following the principles of Dharma with the approach of sacrifice and service is the very substance of bhāratīyasaṃskṛti (Indian culture). An effort from everybody to revive the same is the panacea for all the ills, the country is facing now including Judicial System.

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End Notes

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Glossary

1. Ācāraḥ: Acustom
2. Anu: Name of a tribe
3. Anyavādi: Who resorts to a totally different plea than the one pleaded earlier.
4. Āpasthaṃbaḥ: Author of āpasthaṃba sūtrās.
5. Arthaśāstram: A treatise by kautilya.
6. Aśedhaḥ: Restraint imposed by the plaintiff on the defendant.
7. Āśramāḥ: Four stages in life (brahmacharya, grihasta, vanaprasta, sanyasa.
8. Asvāmi vikrayaḥ: Sale without ownership, 103
9. Atharvaveda: One of the four vedas.
10. Bhāratīyasaṃskrutiḥ: Indian culture.
11. Bhaviṣyapurāṇa: One of the eighteen puranas.
12. Bhauddhāyana: Author of bhauddhāyana sūtrās.
13. Brāhmaṇa: A learned person without any relevance to caste system.
14. Brahmacaryā: One of the four asramas of life.
15. Bṛhadāraṇyaka upaniṣad: It relates to sukla yajurveda.
16. Bṛhaspatismṛti: Smṛti authored by bṛhaspati.
17. Chāndogyopaniṣad: It relates to sama veda.
18. Daṇḍaḥ: Power to award punishment.
19. Daṇḍanītiḥ: Power to punish to maintain law and order.
20. Daṇḍapāruṣya: Assault.
21. Dayābāghā: Law relating to inheritance of property, 3rd part of legal text dharmaratna by jeemuthavahana.
22. Dharmaḥ: Righteous conduct and basis of law.
23. Dharmaratna:Legal text by jeemuthavahana.
24. Dharmasthānam: Court of justice.
25. Dharmastha: Judge, upholder of dharma.
26. Dharmasthīyam: Civil law (kautilya's arthasastra).
27. Dharmasūtrās: Legal procedure in sutra literature.
28. Dyūtasamāhvāya: Betting and gambling.
29. Gana: Local court deals in civil wrongs.
30. Ganaka: scribe.

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31. Gautamadharmasūtras: Oldest dharmasūtras, dealing with legal and religious matters.
32. Gopaḥ: King.
33. Grāminī: Village level administrator of justice.
34. Grāmyavādī: Member of village level court.
35. Grāmavṛddhaḥ: Village level court, fore runner of puga court.
36. Gruhyasūtrās: Relates to religious rituals and personal code conduct.
37. Hanumān: A character in epic ramayana.
38. Hīnavādī: One who resorts to plead a different case after giving up the case.
39. Hitopadeśaḥ: A moral treatise by narayana bhut.
40. Indra: As a king fights against enemies, symbolic usage.
41. Jagadguruḥ: World teacher, a title.
42. Janapada: A territorial state ruled by a king.
43. Janapadadharmās: Local customs.
44. Jayapatra: Judgement.
45. Jīmūtavāhana: Author of dharmaratna a legal text.
46. Kali ej: The fourth age of the world, "the iron age".
47. Kālaviveka: First part of the 'dharmaratna' a legal treatise.
48. Kauṇḍinyasmṛtiḥ: Smriti of recent times by prof. Mahamaho padhyaya. Pullela sriramachandrudu, padmasri awardee.
49. Kauṭilya: Author of arthasastra.
50. Krayavikrayānusāya: Sale and purchase.
51. Kriyādveṣi: One who shuns trial.
52. Kṣatraḥ: Refers to king and kingdom in rv.
53. Kṣatriya: Upholder of socialistic order.
54. Kula: Village level family court.
55. Kulāni: These institutions of private arbitration are quite close to the modern pancayats.
56. Kuladharmaḥ: Family traditions.
57. Kusīdā: Excess interest than what is stipulated.
58. Mastyanyāya: The law of jungle (lawlessness).
59. Mīmāṃsa:Treatise for rules of interpretation.
60. Mīmāṃsaka: Who interprets according to mimamsa.
61. Mitākṣara: A legal text by vijneneswara.

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62. Mitāksaraskūl: Mitakshara system.
63. Mricchakaṭikam: A drama by sudraka of 8th century.
64. Mudrita: Court where chief judge is an appointee of king with royal seal.
65. Nariṣṭhā: Concept of vedic democracy.
66. Nibandhās: Digests covering general view.
67. Nikṣepaḥ: Topic of law in respect of "deposits".
68. Niruktam: Auxiliary work providing etymological explanations to vedic texts.
69. Niruttara: Fails to reply to court and remain silent.
70. Niyogī: Lawyer.
71. Nopastāta: Who fails to appear before the court.
72. Pākaṇḍīs: Who differ from the generally accepted traditions.
73. Pariṣad: An assembly of learned persons having authority to interpret or make laws.
74. Pāsupatās: Sects/tribes having different traditions.
75. Piṇḍa: Rice cake offered in a funeral ceremony.
76. Prāḍvivāka: Judge.
77. Prakṛtīs: Seven elements of state as mentioned in arthasastra of kautily.
78. Pramāṇa: Evidence.
79. Praśnaviveka: Judge who asks questions, 30.
80. Pratiṣṭhatā: Courts appointed by the king, 6, 79, 248.
81. Prāyaścittā: Expiation, 184, 214.
82. Prīeṣṭ: Spiritual teacher who assists the king.
83. Pūgā: Village court, 83.
84. Punaranyāya: Review of judgement or trial.
85. Purohitā: Spiritual teacher who assists the king.
86. Pūrvamīmāṃsa: System of interpretations of texts.
87. Rājadharma: Administration of justice by the king.
88. Rāvana: King of lanka as mentioned in epic ramayana
89. Ṛgveda: Oldest among the four vedic texts.
90. Ṛtam: Supreme transcendental law.
91. Sabhā: Select people in a conclave, venue.
92. Sabhyaḥ: Assessors learned in law.

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93. Sadācāra: Good custom.
94. Sādhyā: The fact to be established in a case.
95. Sāhasam: Offence by violence.
96. Sākṣin: One that has directly seen.
97. Sakulyasarkil: Persons of same lineage/race.
98. Sambhūyasamuthānam: Joint undertaking or partnership.
99. Saṃhitā: Vedic text proper.
100. Samiti: Conclave including common people, venue.
101. Samvidyātikrama: Violation of convention of guilds.
102. Samyaka saṃkalpajā kāmā: Judgement after full reflection.
103. Sanātana dharmaḥ: Fundamental principles of morals embracing all sections of society with equal application.
104. Sapiṇaḍasarkil: It includes four generations of the same family.
105. Śatapatabrāhmaṇa: Commentary on yajurveda having 100 chapters.
106. Satyam: Ultimate truth, never changing.
107. Sāyana: Commentator on adharvana veda.
108. Ṣikṣāvallī: Eighth lesson of taittiriya upanishad.
109. Śilā: Persons possessing knowledge and sympathy and free from love and hatred.
110. Sīmapatram: Document issued by the king fixing the limitations of the disputed boundaries.
111. Sīmavivāda: Boundary dispute.
112. Śiṣṭāgamā:Teachings of a cultured man free from ill feeling.
113. Smṛtiḥ: Remembrances of vedic texts.
114. Smṛticandrikā: Smriti by devan bhatta.
115. Śrāddhā:Religious ceremony to offer rice cakes to satisfy the deceased souls.
116. Śreṇi: Peoples'court with private orbitration.
117. Śrautasūtrā: Principles to regulate religious rituals and personal code of conduct.
118. Śṛti: Vedic text.
119. Steya: Theft.
120. Stobaka: Who gives voluntarily information about the crimes in the society.
121. Strīpuṃdharma: Duties of husband and wife.
122. Strīsaṃgrahaṇa: Adultery.

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123. Subodhinī: Commentary on mitakshara, (Vishveswarabhatta).
124. Sūcakā: Appointed by the king to provide information about the crimes in the society.
125. Sūdrā: One without the knowledge of the sacred law.
126. Sukrācārya: Author of sukraniti a tratise on morals.
127. Svapuruṣa: Bailiff in a court.
128. Svadharma: Dharma relating to a particular place time and nationality.
129. Svasyapriyam: Self satisfaction of a person learned in veda.
130. Tahasildār: Who exercise magisterial powers and supervise collection of revenue taxes.
131. Trivarga: The law, lawful wealth and lawful duties.
132. Vākpāruṣya: Defamation.
133. Varuṇa: Moral governor, omniscient a symbolic expression of lord.
134. Vaśiṣṭha: Author of vasista dharma sutras.
135. Vedās: Revelations of saints having highly evolved consciousness.
136. Vedāñgās: Six auxiliary works to help study vedas.
137. Vetanadānam: Payment of wages.
138. Vibhāga: Partition.
139. Vibhīṣaṇa: Brother of ravana in epic ramayana.
140. Vidhāta: An assembly to settle disputes.
141. Vijñāneśvara: Author of mitakshara a legal text.
142. Vīramitrodaya: Commentary on yājñavalakyasmṛti by mitramisra.
143. Viṣṇusmṛti: Smriti authored by vishnu.
144. Viṣṇu: Author of vishnu sutras.
145. Vraja: A lower court.
146. Vrijina: Sin antonym of ṛtam.
147. Vyavahāra: Legal proceedings.
148. Vyavahārapādās: The titles of law.
149. Yajña: A mixture of religion, legend and custom.
150. Yājñyavalkya: Author of yajnavalkya smriti.
151. Yaju: One of the four vedas.
152. Yama: God of the dead.
153. Yukti: Circumstantial evidence.

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Dr. Ayyadevara Ananthakrishna Rao (B. 1943), is a M.A. (Litt.), LLB, CAIIB; M.A, M.Phil, Ph.D (Sanskrit), PGDCA from the Osmania University. In the Year 1964, got enrolled as Advocate on the Bar Council of A.P. High Court and had the privilege of serving as Junior Advocate for two years in the Chambers of Sri Duvvuri Narasaraju and Sri Triumbak Rao Deshmukh renowned Advocates of Hon'ble Supreme Court/High Court. He joined State Bank of Hyderabad in the year 1967 and retired as Chief Manager in 2002. He represented officers' community in banks as General Secretary at state and national level. Served as Director on the Board of State Bank of Hyderabad for six years from 1992 to 1998. After retirement from Bank Service, he pursued his studies and obtained doctorate in Sanskrit besides continue to volunteer his services in various Community Development Organizations.

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Dr. A Anantha Krishna Rao has done an exhaustive study on 'Jurisprudence in Ancient Bharat' in all important aspects from Vedic literature to modern books on legal studies.

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Prof. K Neelakantham
Director, Sanskrit Academy

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